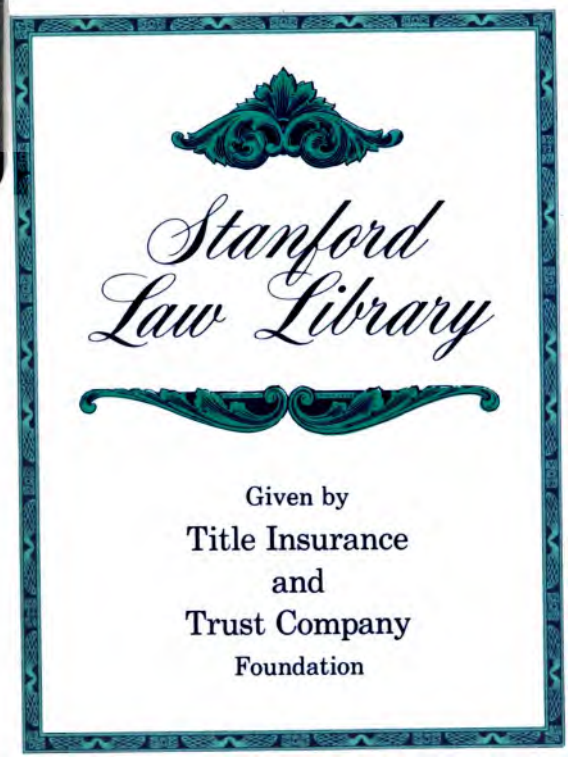
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THE

THEORY AND PRACTICE

OF

CONVEYANCING:

WITH PRECEDENTS;

AN ANALYTICAL TABLE OF REAL PROPERTY;

AND THE

RECENT ACT TO SIMPLIFY THE TRANSFER OF PROPERTY.

Intended chiefly for the Use of Students.

BY JAMES LORD,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

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TO

SIR FREDERICK THESIGER, M.P.,

HER MAJESTY'S SOLICITOR-GENERAL,

AS A TRIBUTE OF SINCERE RESPECT FOR

THOSE TALENTS,

WHICH HAVE EVER DISTINGUISHED HIM

ALIKE

IN THE SENATE, AND AT THE BAR,

THE FOLLOWING WORK

IS DEDICATED,

WITH HIS PERMISSION,

BY

THE AUTHOR.

PREFACE.

THE following work is intended for the use of students in the commencement of their professional studies.

It has been compiled chiefly from MS. notes and extracts made by the author while studying in a conveyancer's chamber during the years 1833, 1834, and 1835.

The want which he felt in the early period of his legal studies, of some work of an elementary nature—some systematic treatise which, without being too voluminous, might serve as a guide and introduction to the subject of his studies, pointing out with brevity and perspicuity the origin and nature

of property, estates, conveyances, &c., led him, with a view to his own improvement, to make copious extracts from various writers of the highest celebrity, as well ancient as modern, on real property law.

He afterwards considered that many other students might participate in the wants which he had himself experienced, and that what had proved useful to him, might also prove beneficial to others.

He does not, however, presume to suppose that this desideratum is supplied in the following work, which is designed not so much to satisfy, as to excite enquiry.

Various events, have intervened during a period of more than ten years, to check the progress of the work and to delay its publication.

It is now submitted to the profession, more as an *introduction* to other books, than with a view of superseding them.

The analytical table may serve as a key to the work.

In supplying definitions, much difficulty has in many cases been experienced, but it has still been endeavoured as much as possible to give the *ipsissima verba* of writers of acknowledged celebrity; and in those instances where the author found rather a *description* than a *definition*, which would have been too long, as well as perhaps too vague, to have served the desired purpose, he has been compelled to frame one, but has still given references to one or more authorities upon the subject, that so a further examination may be made by the reader,—any faults detected, and any errors rectified.

It has not been thought needful to append definitions to the Chart, bound up with this volume, as they are contained in the work, and references are given in the chart

to each page of this volume, where they are to be found.

The provisions of the recent Statute,* to simplify the transfer of property, will be found noticed throughout the work under the respective heads.

3, Elm Court, Temple,
Mich. Term, 1844.

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* 7 & 8 Vict., c. 76.

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WHEN men and nations have advanced to a certain high degree of civilization, they are capable of viewing things in the abstract.

But laws of some kind or another have ever existed, even amongst the inhabitants of the most barbarous countries. Hence, long before the period, at which nations are able to form systems of jurisprudence, on abstract principles of philosophy, they find themselves surrounded by a series of customs, which long usage and common consent

have made the rule of their actions, and dignified with the name of laws.

Indeed it is not from abstract principles that the laws, which govern most nations have been drawn, nor is it upon abstract principles alone that they can be rightly estimated, and carried into effect.

They have flowed gradually in most instances, from the necessities of mankind. Hence various anomalies amongst them. Hence too, it cannot be supposed, that laws, the growth of ages, originating in desultory practices, ripened into customs, at length invested with the high and sacred sanction of laws, elaborated with different enactments, emanating from different minds, under different circumstances, and in different ages, will form a compact and unique system.

We must not, therefore, wonder to perceive an absence of that uniformity and consistency of principle, which might characterize a code, emanating from some master mind; or resulting from the united labours of wise and learned men, met to deliberate upon, and accomplish, so great an undertaking.

It is true, that when nations have emerged from barbarism, they may perceive that a system of jurisprudence, more sound and uniform in its principles, more harmonious in its details, more beneficial in its tendencies and operations, might have been formed, than the heterogeneous mass, by which they then find themselves governed. But the same degree of civilization which has taught them this, has taught them also to know and to appreciate the benefits to be derived from stability; and the experience of our ancestors, throughout many generations, tells us, that they thought it better to preserve a system which worked moderately well, at any rate well enough for most practical purposes—a system which the test of long experience proved to have been beneficial, than to adopt what might, in theory, seem better, but might, in practice, have turned out to be far worse.

And it is hence that, in many minds, the perception of error in legislative details, is not always attended with a determination, or even a desire, to adopt what may appear better.

For almost every great change, whether in natural, political, or theological matters, is attended with some disadvantages,—disadvantages which often appear to counterbalance the good; disadvantages which are immediate, and at once to be encountered, whilst the benefits are future and contingent.

These anomalies, and obsolete laws, are oftentimes therefore for a long while continued, after the causes which called them into existence have ceased; and remain till some opportunity arises for adjusting the whole, and setting them upon a wiser and more equal basis.

Thus, the Roman laws were finally systematized under the Emperor Justinian; and the various customs prevailing throughout France were, during the time of Napoleon, reduced to a system, and became known as the Code Napoleon.

In more recent times various revisions have been made in our own country of the criminal law, real property law, and those relating to bankruptcy and insolvency. Still, however, the laws are not systematized, and we may repeat the observation of Dr. Burn,

with as much justice as he made it, that in the space of upwards of 500 years they have necessarily become very numerous, and not a little confused; so that there is need of another Justinian to revise and digest them.*

The two facts then, first, that our system of civil jurisprudence was not originally derived from the abstract principles of philosophers, consulting what might be best adapted to the future glories of the country, the general convenience of society, and a state of civilization and refinement they could little think of—but from pressing emergencies, which led to the growth of some custom, or the enactment of some law. And, secondly, that on these have been raised an elaborate superstructure, upon which from time to time have been further engrafted various alterations and additions—will prepare the mind of the student — accustomed probably to strict analysis, and mathematical demonstrations— for an absence of that *lucidus ordo*, which he might otherwise have expected.

The elements of our jurisprudence are to

* Preface, p. xxvi.

be traced back to the forests of Germany, rather than to the academies of Athens or Rome. And however fragments of the Civil or Canon Law may be found occasionally scattered throughout, forming as they do a part, indeed the basis, of the Ecclesiastical Law, it is yet to the feudal principles and institutions of our warlike ancestors, that we must trace many of the rules which at the present day affect, and govern, both the tenure and the disposition of property.

Indeed, the Ecclesiastical Law of England prevails only to a limited extent, and is compounded of four main ingredients. 1. The Civil Law. 2. The Canon Law. 3. The Common Law. 4. The Statute Law.

Where these laws at all interfere with or cross each other the order of preference is this: the Civil Law submits to the Canon Law, both of these to the Common Law, and all three to the Statute Law.

1. By the *Civil Law*, is meant the law of the ancient Romans, which had its foundation in the Grecian republics, and is now comprised in the code, pandects, institutes, and novels of Justinian.

II. The *Canon Law*, sprung out of the ruins of the Roman Empire, and from the power of the Roman Pontiffs.

III. The *Common Law*, is so called because it is the common municipal law or rule of justice throughout the kingdom.

IV. *Statute Law*, is made by the King, with Lords Spiritual and Temporal, and Commons, *i. e.*, by the united suffrages of the whole nation, either in person, or by representatives.*

It is generally agreed, that the laws of England, forming the ancient common law of the land, are derived from the northern nations, who, migrating from the forests of Germany, overturned the Roman Empire, and established themselves in the southern parts of Europe. Both the Danes and the Saxons were undoubtedly swarms from this northern hive. The French nation also derive their origin from a tribe of Germans, who crossed the Rhine, under Clovis, about 481 A.D., and established themselves in the northern provinces of France. Normandy,

* See further, "Burn's Ecclesiastical Law," vol. i., preface, i. to xxv.

like other provinces of France, was governed by its own laws, and upon the establishment of the Normans in England, the whole customary law of that province was introduced here; and as our kings had great possessions in France, and frequently visited that country for 200 years after the reign of William I., they borrowed from the French many of the improvements which were made in their jurisprudence, and established them in England.*

The system of feudal policy was established here about the twentieth year of King William I. In the ninth and tenth centuries there were only two tenures, or modes of holding land on the Continent, viz., allodial and feudal. The owner of the allodial, could dispose of it at his pleasure, or transmit it as an inheritance to his children.

A feud, was a tract of land acquired by the voluntary and gratuitous donation of a superior, and held in consideration of fidelity, and certain services, which were in general of a military nature; and the tenure of the feudatory was of the most precarious kind,

* Cruise Dig., vol. i. tit. 1, c. 1, 4th edit.

depending entirely on the will and pleasure of the person who granted it.

But although feuds were thus granted originally by kings and princes only, yet in process of time, the great lords to whom such grants had been made allotted a portion of their own extensive demesnes to their inferiors, as benefices, or feuds.

These were all at first precarious, the *proprietas*, or absolute property, was still in those who had made the grant, while the *dominium utile*, or right of using it, for some definite period only, was in the tenant. The lords might resume the land at their pleasure.

In course of time, however, it became customary to grant lands for a year, afterwards for life, till at length it was unusual to reject the heir of the last tenant, if he was able to perform the services; and ultimately feuds became hereditary, and descended to the posterity of the vassal. Still the vassal could not alien without the lord's consent, nor mortgage it, nor make it subject to debts. This consent of the lord was seldom given without a present, whence the custom of

paying the lord a fine or alienation. If the vassal aliened the feud, or did any act by which its value was considerably diminished, he forfeited it.

In the case of private individuals any person might formerly by a grant of land, have created a tenancy as of his person, or as of any honor or manor of which he was seized. If no tenure was reserved, the feoffee would have held of the feoffor, by the same services of which the feoffor held over. This doctrine having been found to be attended with several inconveniences was altered in the reign of Edward I., by the statute *Quia Emptores Terrarum*,* which directs that upon all sales and feoffments of lands or tenements, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of which such feoffor himself held, and by such service and custom as his feoffor held before.

The variety of ancient tenures, and the incidents to them, are enumerated in "Blackstone's Commentary,"† together with their

* 18 Edward I., c. 1. † Vol. ii., c. 5.

oppressive consequences, and at page 77, it is observed, "that at length the military tenures, with all their heavy appendages, (having during the usurpation been discontinued,) were destroyed at one blow by 12 Car. II., c. 24, a statute which was of a greater acquisition to the civil property of this kingdom, than even *Magna Charta* itself, since that only pruned the luxuriances that had grown out of military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches."

That statute enacted that the court of wards and liveries, and all wardships, liveries, primer, seizin, and *ousterlemains*, values, and forfeiture of marriages, by reason of any tenure of the king's, or others, be totally taken away. And that all fines for alienations, tenures by homage, knight service, and escuage, and also aids for marrying the daughter, or knighting the son, and all tenures of the king, *in capite*, be likewise taken away, and that all sorts of tenures held of the king or others, be turned into free and

common socage, save only tenures in frank almoign, copyholds, and the honorary services (without the slavish parts), of grand sergeanty.

CHAPTER II.

NATURE AND CLASSIFICATION OF PROPERTY.

Property, its origin and nature, classification of, definition of, popular meaning of the term, division of, by Law of England, Real, Personal, Mixed—Corporeal—Lands—Tenements—Hereditaments—Money considered in Equity as Land—Incorporeal, definition of, various kinds, 1. *Advowsons,* 2. *Tithes,* 3. *Commons,* 4. *Ways,* 5. *Offices,* 6. *Dignities,* 7. *Franchises,* 8. *Corodies,* 9. *Annuities,* 10. *Rents.*

It is not intended here to enter upon a lengthened disquisition as to the origin of property, laws, and government; a few general observations will, however, be given, by way of introduction to the more practical portion of the work.

It would seem probable that those things which were originally in common, became the property of the party first appropriating them; occupancy gave the right to the tem-

porary use of the soil, and the original right to the permanent property in the substance of the earth itself.* And in order to the safety and continuance of that property, recourse was had to civil society, which brought with it a long train of inseparable concomitants, states, governments, laws, punishments, and the public exercise of religious duties.

Property is the highest right a man can have to anything, being used for that right which one hath to lands or tenements, goods or chattels, which no way depend upon another man's curtesy.

In its more popular and general sense the term is used to signify as well the land, money, stock, benefice, &c., in which a party is interested, as the right or title he has to it. Thus it is common to hear one speak of a house, land, a farm, a ship, stock, furniture, or other things, as being his property, and no less common to speak of having property in any of them.

In the former cases, the term property denotes the substance, the reality, the thing itself; whilst in the latter it is used to express

* Bl. Com., bk. ii., c. 1.

the claim to any of them, or the title and interest which a party has in them.

By the law of England property is divided into two chief kinds, real and personal, which are governed in many respects by distinct rules and systems of jurisprudence.

Things real, are such as are permanent, fixed, and immoveable, and may be either of a corporeal or incorporeal nature.

Real property consists of all rights and profits arising from, and annexed to lands, that are of a permanent and immoveable nature, and is usually comprehended under the words, lands, tenements, and hereditaments.

Things *personal* are goods, money, and all other moveables, which in contemplation of law, may attend the person of the owner wherever he thinks proper to go.*

It is, however, to real property and the laws relating thereto that the present treatise chiefly refers.

There is also a third kind of property, not directly belonging to either of the former

* 2 Bl. Com., c. 2.

descriptions, but partaking of the nature of each, which being in some respects strictly personal in its nature, yet descends as real property to the heir, and is therefore denominated *mixed.*

Under this denomination must be placed heir-looms, which though in their own nature personal, yet so far savour of the reality, that they are held to belong to it, and go with the real estate, as a limb or part of the inheritance; so deer in a park, fish in a pond, &c.* So also of charters, deeds, court rolls, and other evidences of land, together with the chests or boxes in which they are contained.†

And an heir-loom, though neither land nor tenement, but a mere moveable, yet being inheritable, is comprised under the general word hereditament.‡

And Lord Coke says, that when the King created an Earl of such a county or other place, to hold that dignity to him and his heirs, this dignity is personal, but also concerneth lands and tenements.§

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* Co. Lit., 8. a. † Pusey *v.* Pusey, 1, Vern. 273.
‡ 2 Bl. Com., c. ii. § Co. Lit., 2 a 1. b.

Property is further considered as being of a corporeal or incorporeal nature. Corporeal property consists wholly of substantial and permanent objects, all which may be comprehended under the general denomination of lands, tenements, and hereditaments.

Land, in its legal signification, comprehends all things of a permanent substantial nature, as meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It also legally includes all houses, castles, and other buildings thereon, and has in law an indefinite extent upwards as well as downwards, for it is holden *cujus est solum, ejus est usque ad cœlum*,* and thus, whatever may be the subject of a feoffment and lies in livery, may be regarded as a corporeal hereditament.

Tenement in its original, proper, and legal sense, signifies everything that may be holden provided it be of a permanent nature.‡

It will pass not only lands and other inheritances that are holden, but also offices,

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* Co. Lit., 4 a.; and see further Preston on Estates.

‡ 2 Bl. Com., c. 2.

rents, commons, profits out of land, and the like.*

Thus, though by the word *lands* in a devise, and advowson in gross will not pass, yet by the words tenement and hereditament it will, because an advowson is an hereditament, though of an incorporeal nature.†

But the word hereditament is by much the largest and most comprehensive expression, and includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real or personal, or mixed.‡

Shares in the navigation of the river Avon are held to be real property.§

And by construction of courts of equity, where what is contracted or directed to be done is oftentimes regarded as done, much property which is not in itself of a real or corporeal nature, is regarded as such. Where,

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* Co. Lit., 6 a.

† Westfaling *v.* Westfaling, 3 Atk., 460; Hazlewood *v.* Pope, 3 p. Wms. 322.

‡ Co. Lit., 6 a.

§ Buckeridge *v.* Ingram, 2 Ves. Junr., 302.

for instance, money is agreed to be laid out in the purchase of land, it is considered in equity as land. For, per Master of the Rolls in Fletcher *v.* Ashburner,* nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and that too in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid, or whether the land is actually conveyed, or only agreed to be conveyed; and see Wheldale *v.* Partridge.†

Incorporeal.

Incorporeal property consists of rights and profits arising from, or annexed to land, such as advowsons and rents, which are held to be of a real nature.

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* 1 Bro. c. c. 497.

† 5 Ves. Junr., p. 388.

It is thus defined by Sir W. Blackstone:—

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within the same.*

It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as *e. g.*, a rent issuing out of those lands or houses, or an office relating to those jewels.

Corporeal hereditaments are the substance, incorporeal hereditaments are but a sort of accidents which inhere in and are supported by that substance.

The instance of an advowson will further and more clearly illustrate the distinction between corporeal and incorporeal hereditaments.

It is not itself the bodily possession of the church, but it is the right to give some other man a title to such bodily possession. The advowson is the object of neither sight nor touch, and yet it perpetually exists in the mind's eye, and in contemplation of law.

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* 2 Bl. Com., 19.

Incorporeal hereditaments are principally of ten sorts, viz.—1. Advowsons; 2. Tithes; 3. Commons; 4. Ways; 5. Offices; 6. Dignities; 7. Franchises; 8. Corodies or pensions; 9. Annuities; 10. Rents.

Of each of these, following the method of Blackstone, it is important a few words should be said.

An advowson is the right of presentation to a church or ecclesiastical benefice.*

The right of advowson, or of presenting a clerk to the bishop as often as a church becomes vacant, was first gained by such as were founders, benefactors, or maintainers of the church. This was either by reason of the foundation, as where the ancestor was founder of the church; or by donation, where he endowed the church; or by reason of the ground, as where he gave the soil whereupon the church was built.†

Although the nomination of fit persons to officiate throughout the diocese was originally in the bishop and no other, yet when lords of

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* 2 Bl. Com., p. 20; 1 Inst. 17 b, and 119 b.

† Co. Lit., 119; Burn's E. L., vol. i., p. 6.

manors were willing to build churches and to endow them with manse and glebe, for the accommodation of fixed and residing ministers, the bishops on their parts, for the encouragement of such pious undertakings, were content to let those lords have the nomination of persons to the churches so built and endowed by them; with reservation, however, to themselves, of an entire right to judge of the fitness of the persons so nominated. And what was the *practice*, became in time, the *law* of the Church.*

The right of presentation and that of nomination are sometimes confounded, but they are distinct things. Presentation is the act of the patron offering his clerk to the bishop of the diocese, to be instituted to a church.† Nomination is the power of offering a clerk to a patron, by him to be presented to the ordinary. And these rights may exist in different persons at the same time.‡

Presentation must be made within six calendar months after the death of the last

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* Burn, E. L. vol. i., p. 6. Gibson, 2d edit., 756.

† Co. Lit., 120, a. ‡ Plow., n. 382.

incumbent, otherwise the right to present accrues or lapses to the ordinary. And if the bishop do not collate within six months after the right devolves on him, then it falls to the archbishop, and on the neglect of the metropolitan, it will lapse to the Crown; and the Queen as patron paramount of all benefices within the realm, will have the right of presenting to the vacant benefice.*

2. Tithes may be defined as being a right to the tenth part of the produce of lands, the stock upon lands, and the personal industry of the occupiers.

There is a great difficulty in ascertaining the period at which tithes were introduced into this country.

The first English law in which they are mentioned, appears from Selden,† to have been in the year, A.D. 786. The next appears to have been in the time of King Alfred, A.D. 900; and again in the laws of Athelstan, A.D. 930; and this, Sir William Blackstone assures us, is as much as can

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* 2 Rolle, Abr. 368, B. † C. 8, s. 2.

be traced out with regard to their *legal* origin.*

It would seem that on their first introduction, tithe-payers might have paid their tithes to what spiritual person they would.† And these arbitrary consecrations of tithes, though interrupted for a while by the laws of King Edgar and Canute, continued in general use till the time of King John, and naturally enough account for the number and riches of the monasteries in those days, and which were frequently endowed with tithes.

But at the close of the twelfth century it was enjoined that tithes should be paid to the parsons of the respective parishes, where those paying them inhabited; and they are now due of common right to the parson of the parish, unless there be a special exemption.‡

There are many exemptions from the payment of tithes, and these may be by real composition, as when an agreement is made between the owner of the lands and the

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* 2 Bl. Com., 25. † 2 Inst., part ii., p. 552.

‡ 2 Bl. Com., 27.

parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson in lieu and satisfaction thereof; * by custom or prescription, as where time out of mind certain persons or certain lands have been either partially or totally discharged from the payment of tithes; and this custom may be either *de modo decimandi*, or, *de non decimando, i. e.*, a custom by which a particular manner of tithing is allowed, which is commonly called a modus, or a custom for not paying any tithe at all.

Lands may also be exonerated from any liability in respect of tithes by Act of Parliament, and in inclosures of commons, or reclaiming waste lands, it is very usual to allot a certain portion of *land* in lieu of tithes.

3. Right of common, is the profit which one man hath in the lands of another, as to

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* 2 Inst., p. 490. 2 Bl. Com., 28.

feed his beasts, catch fish, dig turf, cut wood, or the like.*

It commenced in some agreement between the lords of manors and their tenants, for valuable purposes, tending to their mutual benefit; and being continued by usage is good and valid at present, though there be no deed or instrument in writing, to prove the original grant.†

With respect to the several rights of the lord or owner of the soil and the commoners, it has been long settled that the lord of the manor or other owner of the soil in which there is a right of common, has the freehold and inheritance in him, and may exercise every act of ownership not destructive of the commoner's right. ‡

And as regards the rights of commoners, it is settled that in the case of common of pasture they have nothing to do with the

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* Finch Law, 157. 2 Bl. Com., 32.

† Cruise, Di. Tit. xxiii.

‡ 1 Inst., 122, a. Roe. d. Conolly *v.* Vernon and others. 5 East, 51.

soil, but only a right to take the grass with the mouths of their cattle.*

It has therefore been held that a commoner cannot even make a trench or ditch on the common to let off the water, unless he be authorized by a custom.†

4. Right of way is the privilege which an individual or a particular description of persons, such as the inhabitants of the village of A, or the owners or occupiers of the farm B, have of going over another person's ground.

It is an incorporeal hereditament of a real nature, and is entirely different from the king's highway which leads from town to town, and also from the common way which leads from village to village.‡

5. Offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging;§ and all public offices must originally have been created by the sovereign as the fountain of honour.‖

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* 1 Roll. Ab., 406. † Cro. Eliz., 876.

‡ Thomas's Co. Lit., vol. i., p. 234, note D. 1.

§ 2 Bl. Com., 36. Co. Lit. 20.

‖ 4 Inst., 75. 2 Bl. Com., 36.

Those offices which concern lands or certain places may be entailed because they savour of the realty. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certain place, such inheritances cannot be entailed, because they savour nothing of the realty.*

6. A Dignity is a title of honour derived from the crown. Those which now exist in England, owe their origin to the feudal institutions, and were first introduced here by the Normans.† And dignities, or titles of honour, having been originally annexed to landed possessions, are classed amongst this species of real property, as being an hereditament in which a person may have a freehold estate.

A dignity is distinguishable from an office in this, that to an office some duty or function is always attached; whereas a dignity is a

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* Co. Lit. 19, b.

† Cruise, Di. Tit. xxiv.

title or distinction of honour, unconnected with any trust or obligation.*

Dignities are hereditary in the family of the person ennobled, and when they are by *tenure*, the descent is subject to the same rules, with respect to primogenitures, &c., as govern the descent of lands, castles, and manors to which they were annexed.

The descent of dignities by writ is, however, in some respect different from that of lands, for possession does not affect it, as every person claiming a dignity must make himself heir to the person first summoned to Parliament, and not, as in the case of lands, to the person last seized.†

The Crown has only the prerogative of terminating the abeyance or suspension of a dignity, by nominating any one of the co-heirs to it, and such nomination operates not as a new conveyance or creation of a barony, but as a revival of the ancient one, for the nominee becomes entitled to the place

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* Elements of Convey., vol. i. p. 299.

† Cruise, Dig. Tit. xxvi. c. 3.

and precedence of the ancient barony to which he is nominated.*

7. A franchise is a Royal privilege, or branch of the King's prerogative subsisting in the hands of a subject.†

Franchises are of various kinds, and arise from the King's grant or from prescription which pre-supposes a grant.

8. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance.‡

9. Annuities. An annuity is a yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only.§

It differs from a rent charge in this, that a rent charge is a burden imposed on and issuing out of lands, whilst the annuity is a yearly sum chargeable only on the *person* of the grantor.

10. Rent is an annual return made by the

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* Thomas Co. Lit., vol. i., p. 115, n. 16.

† 2 Bl. Com., c. 2; Finch Law, 164.

‡ Finch Law, 162; 2 Bl. Com., 40.

§ Co. Lit., 144, b.

tenant either in labour, money, or provisions, in retribution for the land that passes.*

It signifies, in the language of Coke, a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance, and is defined to be a certain profit, issuing yearly out of lands and tenements corporeal.†

But though there must be a profit, yet there is no occasion that the rent should consist of money. For it may be in delivery of hens, capons, roses, spurs, bows, shafts, horses, pepper, cummin, wheat, or other profit that lieth in render, office, attendance, and such-like.‡

There are, says Littleton,§ three manners of rent, rent service, rent charge, and rent seck.

Rent service is so called because there is some corporeal service incident to it. ||

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* Lord C. B. Gilb. Rents, 9; Co. Lit., 141, b.
† Co. Lit., 141, b.; 2 Bl. Com., 41.
‡ Co. Lit., 142, a. § Ibid, s. 313.
|| Ibid, 142, a.

Rent charge is so called because the land for payment thereof is charged with a distress. For when a grant was originally made of a rent out of lands by deed, the grantee could not have distrained for it. And to remedy that inconvenience, an express power was inserted in the grant.*

A rent seck was nothing more than a barren rent, for the recovery of which no power of distress was given either by the rules of common law or the agreement of the parties.†

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* Co. Lit., 143, b. † Cruise, tit. xxviii.

CHAPTER III.

WHO MAY HAVE PROPERTY, IN WHAT CAPACITY IT MAY BE HELD, AND HOW IT MAY BE ACQUIRED.

Of the persons who may have property, the capacity in which it may be held, and how it may be acquired—Alienation of Property—Who may alienate—Various disabilities—Policy which has led to some of them—Feme coverte—Infants-Committees of Lunatics—Powers given to the Lord Chancellor where Trustees or Mortgagees are Lunatic — Corporation, definition of—Aggregate, sole, lay, ecclesiastical—Incidents to—Perpetuity—Mortmain, statute of—Corporation must convey by Deed under Seal—Property may be acquired by descent or purchase—Definitions—Distinction between the two—Things personal—Special Occupancy, what it is.

THE alienation of real property may be prevented or frustrated by the incapacity of the grantor to give, or of the grantee to

receive it, or by the refusal of the latter, or by a prohibitory or remedial statute. The power of alienation is also sometimes conferred or enlarged by statute.*

All natural born persons within the dominions of the Crown of England, whether *feme coverte* or sole, infant or of age, lunatic or idiot, are capable of holding freehold estates unless they are attainted of treason, or felony, or have incurred the penalties of a *præmunire*,† as also may corporations, whether aggregate or sole, spiritual or temporal.

But the acquisition of more property, and also the transfer of dealing with that already possessed is, to a certain extent, restricted and modified in all those instances where the coverture, infancy, lunacy, idiotcy, corporate capacity, or otherwise, may render the owner legally incompetent or disqualified to part with it, or the party wishing to acquire more incompetent, unless conforming to certain rules and regulations required and prescribed by law.

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* Burton on Real Property, 188. † 1 Inst. 2, b.

The policy which has led to such restrictions seems to have arisen from a desire, in most instances, to protect the weak from the strong, the artless from the designing, and those who, by natural or acquired infirmity, are unable to manage their own affairs, from becoming victims to those who might otherwise take an undue advantage of them.

It will be desirable, therefore, for the information of the student, to have a few practical remarks upon those cases in which parties are placed under any regulations as to their property.

In legal language, a married woman is termed a *feme coverte*, and the expression, "*during coverture*," means during the continuance of the marriage.*

A *feme coverte*, or married woman is, by the policy of the law, placed under many restrictions during coverture, for her own benefit and the security of her property. Though husband and wife are considered in law but as *one* person, still the wife may, by agreement, have distinct property and dis-

* Co. Lit., 112, a.

tinct rights from her husband. Where by antenuptial, or in some cases even by post-nuptial contract, property has been assigned and conveyed for the sole and separate use and benefit of the wife, or where it has been so and upon such terms bequeathed to her, or where a power of appointment is given to her over property; in all such cases she has rights independent of her husband, and her property will remain unaffected by his transactions. In the execution of a power given, or reserved to a *feme coverte*, and indeed all powers, the formalities required to attend must be rigidly complied with, otherwise there is no execution of the power. The only exception to this general proposition is made by the recent Act 1 Vic. c. 26, for the amendment of the laws with respect to wills, which provides, s. 10, that no appointment made by will in exercise of any power, shall be valid unless the same be executed in manner thereinbefore required; and every will executed in manner thereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required

that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

And the Act also provides, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of that Act.

By 11 Geo. IV. and 1 Wm. IV., c. 60, s. 19, it is enacted, that in certain cases the husbands of female trustees shall, for certain purposes, be deemed trustees within that Act.

An infant is a person within age. This, according to our laws, is for most purposes so long as a person is under the age of twenty-one years.

Though capable of inheriting and purchasing property and doing what the law may hold for his benefit, yet purchases made and contracts entered into by him, except for necessaries, may be repudiated and set aside on his coming of age. Some contracts entered into by infants are void, others only voidable, and capable therefore of confirmation by the infant on coming of age.*

* Co. Lit., 2, a.

mittees of such persons to convey land, or may direct the Committee or other person to transfer stocks or funds standing in the name of a lunatic trustee, and receive the dividends.

A corporation or body politic is a body to take in succession, and it is called a corporation or a body incorporate, because the persons are made into a body, and are of capacity as such to take and grant, &c., and this body politic or incorporate may commence or be established three manner of ways.

1. By prescription.
2. By letters patent.
3. By Act of Parliament.*

Corporations, as to the number of persons constituting them, are aggregate or sole, and with reference to the objects for which they are constituted may be distinguished into lay and ecclesiastical;† some are of a mixed nature, composed of spiritual and temporal persons, as heads of colleges and hospitals, &c.

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* Co. Lit., 250, a. † Co. Lit., 250, a.

The term *corporation* might seem to convey its own meaning and to require no explanation, if it were not for the fact, that in legal language, a corporation may consist of one person, as well as of many persons, which renders necessary the distinction, into aggregate and sole. A sole corporation then consists of one single person, as the king or queen regnant, a bishop, a dean, &c.; whilst a corporation aggregate consists of many persons, as mayor and commonalty, dean and chapter.

Ecclesiastical corporations are bishops, deans, archdeacons, parsons, vicars, &c.

Lay corporations are mayors, commonalty, bailiffs, and burgesses.

There are some incidents peculiar to each of these, some common to all of them. Thus though all natural persons may be joint tenants, yet bodies politic or corporate, cannot be joint tenants with each other. Nor can the king or a corporation, whether sole or aggregate, be joint tenants with a natural person.*

Perpetuity is in the eye of the law one of

* 1 Inst., 190, a.

the essential properties of corporation. Like the king they never die, and property once theirs will not be affected by any of the ordinary contingencies which affect the property of private persons, but will remain theirs for ever, unless some voluntary act on their part, done in their corporate capacity, alienates it, or the strong arm of the law wrests it from them.

And to prevent too great an accumulation of landed property in the hands of corporations, they have been prohibited by several statutes, both ancient and modern, from purchasing more lands without a license from the crown.*

Corporations aggregate, have incident to them a common seal, and all grants by them must be by deed under their common seal, and are good without the form of delivery.†

Property may be held in one's own right or in trust for others, and the interest or estate of a party may be of a legal or equit-

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* 7 and 8 W. III., c. 37. Thomas's Co. Lit., 99, a, n. 1.

† Dav. 44. Thomas's Co. Lit., 342, a., p. 185, n. C.

able nature. For a few practical remarks upon these points the reader is referred to c. vi.

With regard to the acquisition of property, there are two chief modes, to one of which all others may in a legal sense be reduced: those are,

1. By descent.
2. By purchase.

Descent is the means whereby one doth derive his title to certain lands as heir to some of his ancestors.*

It is thus defined by Sir W. Blackstone:— Descent, or hereditary succession, is the title whereby a man on the death of his ancestor, acquires his estate by right of representation as his heir-at-law; an heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor, and an estate so descending to the heir is called the inheritance.†

Purchase, is here used not to denote land

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† Co. Lit., 13, b.

‡ 2 Bl. Com, c. xiv., p. 201.

acquired by the mere act of bargain and sale for money or money's worth, but in its largest and most extensive legal sense, and according to Littleton, purchase "is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed."* Hence purchase is in this sense contra-distinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the simple operation of law.†

If an estate be freely given to a man, he will be a purchaser in the eye of the law. So too, even before a recent enactment, if the ancestor devised his estate to his heir-at-law, with other limitations, or in any other shape than the course of descents would direct, such heir would have taken by pur-

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* Lit., s. 12. † Bl. Com., ii., 241.

chase.* And now it is provided† that when land (after 1833) shall be devised to the person who shall be heir to such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent. And where any land shall be limited (after 1833) to the person, or to the heirs of the person, who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof.

With regard to occupancy, common occupancy, as to real property, does not now exist.

Formerly, however, where a man was tenant *pour autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie, i. e.*, he for whose life the estate was held, then he that could first enter might lawfully retain the pos-

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* Emerson *v.* Inchbird, 1. Lord Raymond, 728.

† 3 and 4 W. IV., c. 103, s. 3.

session so long as *cestui que vie* lived, by right of occupancy.*

But now this is otherwise, and by statutes 29, C. II., c. 3, s. 13; and 14 Geo. II., c. 20, s. 9, that mode of gaining a title is put an end to.

Special occupancy, however, still remains, and is, where land is granted to A for life of B, and A dies, the heir of A, as special occupant, may enter and hold possession during the life of B, the *cestui que vie,*† or person for whose life the estate was granted.

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* 2 Bl. Com., 258. † 2 Bl. Com., 259.

CHAPTER IV.

HOW INTEREST IN PROPERTY MAY COMMENCE OR TERMINATE.

The interest of any person in Property may commence or terminate in divers ways—1. *By act of God, as by death of owner, or cestui que vie, by inundation.* 2. *By act of the Law, as in cases of Intestacy, Bankruptcy, Insolvency, Reversions, Estates in Dower, Curtesy, Tenant in Tail after possibility of issue extinct.*

PROPERTY may cease to belong to its owner by various means; *e. g.*, by act of God; as by the death of the owner, or of the party for whose life he held or was entitled to property; as where the tenant for another man's life by his deed grants a rent-charge for one-and-twenty years and *cestui que vie; i. e.*, he for whose life the grantor of the annuity held the estate, dieth, the rent-charge thereby becomes extinguished;* by

* Co. Lit., 148, a.

inundations, by encroachments of the sea;* or by other modes which emanate not from the volition of the party, or act or operation of the law.

And where tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God.†

And the same law is of lessee for years of tenant for life. So if a man be seized of land in right of his wife, and soweth the ground and dieth, his executors shall have the corn.

2. By act of the law; as in cases of the intestacy, insolvency, bankruptcy, or felony of its owner, in cases also of reversions, in each of which instances the property, without any act on the part of the owner so dying intestate, becoming insolvent or bankrupt, or committing felony, passes away from him to other persons.

Intestacy, as we shall see more fully hereafter, is where a party dies without making a will or testament; *i.e.*, without any legal

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* Thomas i., 469, n. G., i. Co. Lit., 53, b.

† Co. Lit., 55, b.

declaration of his intentions which he wills or wishes to be performed after his decease in respect of his property.

A will or testament is a solemn act or instrument, whereby a person declares his mind and intention as to the disposal of his lands, goods, or effects, and what he would have done after his death.*

He who makes the testament is called the testator, and when a man dies without a will, he is said to die intestate.

3. By bankruptcy.

A bankrupt is defined as "a trader who secretes himself, or does certain other acts tending to defraud his creditors." †

The first statutory enactment upon the subject made concerning English bankrupts, is 3 and 4 Henry VIII. c. 4, when trade began first to be properly cultivated in England, and from that time to the present, various and extensive alterations have been made in this very important department of the law.

By virtue of which a bankrupt loses all his real estates, which are at once transferred

* Co. Lit., 111, a. † 2 Bl. Com., 285.

to others, to be disposed of for the benefit of his creditors.

By 1 and 2 Wm. IV. c. 56, s. 26, any conveyance to the assignees is rendered unnecessary, and the real estate of a bankrupt vests in his assignees, by virtue of their appointment.

An estate in reversion is also created by act of law.

As when a person has an interest in lands, and grants a portion of that interest, or in other terms, a less estate than he has in himself, the possessor of those lands shall on the determination of the granted interest or estate, return or revert to the grantor. And this is called a reversion.*

Estates in dower and curtesy, as also estates in coparcenary arise from the operation of legal principles, without requiring any deed for their creation.

Property may further be conveyed, or charged, by any of the modes mentioned post chapter ix.

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* Watk. Con., c. xvi., p. 188.

... recent statute real property is ... for the payment of simple contracts as well as specialty debts, whether the ... may so have directed or not.

... mode in which a party's interest ... may terminate is by effluxion of ... mode of transferring property, in ... itself at the period prefixed or ... owner or some person from or ... claims, transfers the property, as, for example, in estates ... or those created only for a ...

CHAPTER V.

THE ESTATE OR INTEREST WHICH MAY BE HAD IN PROPERTY, OR THE MODES AND TERMS OF HOLDING IT, WITH REFERENCE TO ITS DURATION, QUALITY, &c.

Section I. Of Estates of Freehold—Definition—Division of, by Common Law, into, 1, *Freeholds of Inheritance, Fee-simple, Absolute, Qualified, Fee-tail, General, Special, Male, Female—Freeholds not of Inheritance, as Tenant for Life, His own Life, Pour autre vie, Dower, Jointure, Curtesy.*

Section II. Less than Freehold—Terms for Years—Estates at Will, at Sufferance.

Section III. Estates by Custom, as Copyhold, Customary Freehold.

Section IV. Legal and Equitable Estates, or Interests—Division of Property into Legal and Equitable Estates peculiar to our Jurisprudence—Ought to be well understood—Uses not noticed at first by Courts of Common Law—Lord Bacon's Definition of what a Use is not—Mode of Creating it—Were devisable at Common

Law, when Lands were not—Uses productive of many evils—Stat. 27 H. VIII. passed to abolish them—Does not accomplish that object—Gives rise to new modes of Conveyance—Trusts—Definition of Trusts.

Equity and Common Law distinguished—Not opposite systems, but parts of one whole—Equity follows the Law—Trustees—Cestui que trusts.

STATE, or estate, signifieth such inheritance, freehold, term for years, or the like, as a man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass.*

Estates may be considered in a three-fold view.†

1. With regard to the duration of interest which the tenant has in his tenement. Of this the present chapter treats.

2. With regard to the time at which that quantity of interest is to be enjoyed, for which see chapter vi.

3. With regard to the number and connexion of the tenants. Post c. vii.

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* Co. Lit., 345, a.

† Bl. Com., bk. ii., c. vii., p. 103.

Division of Estates.

Estates by the Common Law or by custom, may properly be considered under one of two great divisions with reference to the interest which the tenant has in his tenement, viz. :—

1. Those of a freehold nature.
2. Those of a nature less than freehold.

Estates of a freehold nature are again divided into those which are of inheritance, and may consequently either be devised by the owner, or, on his dying intestate, go to his heir; and those which are not of inheritance, but in which the owner has no interest beyond the period of his own life, or the life of *cestui que vie, i. e.,* the person for or upon whose life the estate is held.

Estates of inheritance may be also divided into those of fee-simple, which may be absolute or qualified; and fee-tail, and this into tail general and special, male and female.

Estates of freehold not of inheritance, are those which the owner has for his own life only, or the life of another person.

Copyholds and Customary Freeholds.

Those less than freehold are leasehold, estates at will, and estates at sufferance.

Estates by custom, as copyholds, &c., may be subjected to a nearly similar division.

In any of these forementioned estates, the interest of a party may be of a legal or equitable nature.

In considering the various but important points of this chapter, the best order which suggests itself is to divide the chapter into four sections, devoting one section to each of the principal divisions referred to, and to treat of them in the following order:—

1. Of estates of freehold.
2. Of estates less than freehold.
3. Of estates by custom.
4. Of legal and equitable estates, or interests.

SECTION I.

1. *Of Estates of Freehold of Inheritance.*

Every one who hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold; but they of a greater estate have a freehold, for he in fee-simple hath a

freehold, and tenant in tail hath a freehold, &c.*

Tenant in fee-simple is he which hath lands or tenements to him and his heirs for ever.†

For if a man would purchase lands in fee simple, it behoveth him to have these words in his purchase, "to have and to hold to him and his heirs for ever.‡

And a man cannot have a more large or greater estate of inheritance than fee-simple.§ When a person grants away an estate in fee simple, he cannot make a further disposition of it, because he has already granted away the whole interest, consequently nothing remains in him.

From this estate in fee-simple, estates tail and all other particular estates are derived.‖

Tenant in fee-simple may create any inferior estate out of his own. He may also part with his entire interest. For power of

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* Lit., s. 57.
† Lit. Tenures, c. 1, s. 1.
‡ Co. Lit., 1, a.
§ Lit. s. 11.
‖ Co. Lit., 18, a.

alienation is an incident inseparably annexed to this estate, and any restriction upon it is void, as inconsistent with the nature of the estate.

Fee-simple is either, 1. Absolute; 2. Conditional; 3. Qualified; or, base.*

When an estate, limited to a person and his heirs, has a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end, it is then qualified or base fee.†

But the proprietor of a qualified or base fee has the same rights over his estate till the qualification upon which it is limited is at an end, as if he were tenant in fee-simple.‡

In cases of intestacy, fee-simple estates will descend to those who are the heirs-general of the intestate, whether male or female, lineal or collateral.

And by 3 & 4 W. IV., c. 104, freehold estates are in all cases to be assets for the

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* 1 Inst., 1, b.

† 1 Inst., 27, a.

‡ Plowd., 557.

payment not only of specialty but also of simple contract debts.

A man may have a fee-simple in three kinds of hereditaments, real, personal, and mixed. Real, as in lands and tenements; personal, as if an annuity be granted to a man and his heirs; mixed, as where the crown created an earl of such a county, or other place, to hold that dignity to him, and to his heirs; this dignity is personal, but it also concerneth lands and tenements, and is therefore mixed. *

A person may be tenant in fee-simple of an advowson as well as of a piece of land, in which case he and his heirs have a perpetual right of presentation. †

Tenant in fee-tail is, by force of the Stat. of West. ii., c. 1, for before the said statute, all inheritances were fee-simple; for all the gifts specified in that statute were fee-simple, conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute, tenant in tail is in two

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* Co. Lit., 2, a, 1, b. † 1 Inst., 322, b.

manners, that is to say, tenant in tail general and tenant in tail special.*

Tenant in tail general, is where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is said *general tail*, because whatsoever woman that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issue by possibility may inherit the tenements by force of the gift, because that every such issue is of *his* body engendered.†

Tenant in tail special is where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten.‡ And may be either male or female; the former, where land is given to a man and his heirs male;§ the latter where lands or tenements are given to a man and his heirs female.‖

Tenements is the only word used in the statute Westm. II., but it includes not only

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* Lit., s. 13; and Co. Lit., 19, a.

† Sect. 14.

‡ Ibid., 16.

§ Lit., s. 21.

‖ Ibid., 22.

all corporeal inheritances that may be holden, but also all inheritances issuing out of such inheritances, or concerning or exerciseable within the same, though they be not in tenure; therefore all these without question may be entailed, as rents, estovers, profits, whatever granted out of the land, or uses, offices, dignities, which concern lands or certain places, may be entailed within the said statute, because all these savour of the realty.*

Lands given to a man and woman *unmarried* and the *heirs of their bodies* will be an estate tail special, for they *may marry*.†

Mere personal chattels which savour not at all of the realty cannot be entailed; neither can an office which merely relates to such personal chattels, nor an *annuity* which charges only the *person*, and not the *lands* of the grantor.

Neither can a copyhold be entailed by virtue of the statute, for that would tend to encroach upon and restrain the will of the

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* Co. Lit., 20, a. † Co. Lit., 25, b.

[illegible]

ries, the tenant in tail may by any species of deed duly enrolled and otherwise made in conformity with the Act, absolutely dispose of the estate of which he is seised in tail, in the same manner as if he were absolutely seised in fee. If such assurance be in conformity, &c.

The Act requires the concurrence of the protector to enable the tenant in tail to make an absolute disposition of the entire fee so as to bar the estates in remainder dependant upon his estate tail.

2. Of Estates of Freehold not of Inheritance.

Tenant for term of life is where a man letteth lands or tenements to another for term of the life of the *lessee*, or for term of the life of *another man*. In this case the lessee is tenant for term of life. But by common speech he which holdeth for term of his *own* life is called tenant for term of *his* life; and he which holdeth for term of another life is called tenant for the term of another man's life, or tenant per terme d'autre vie.*

* Lit., 356.

declaration of his intentions which he wills or wishes to be performed after his decease in respect of his property.

A will or testament is a solemn act or instrument, whereby a person declares his mind and intention as to the disposal of his lands, goods, or effects, and what he would have done after his death.*

He who makes the testament is called the testator, and when a man dies without a will, he is said to die intestate.

3. By bankruptcy.

A bankrupt is defined as "a trader who secretes himself, or does certain other acts tending to defraud his creditors." †

The first statutory enactment upon the subject made concerning English bankrupts, is 3 and 4 Henry VIII. c. 4, when trade began first to be properly cultivated in England, and from that time to the present, various and extensive alterations have been made in this very important department of the law.

By virtue of which a bankrupt loses all his real estates, which are at once transferred

* Co. Lit., 111, a. † 2 Bl. Com., 285.

to others, to be disposed of for the benefit of his creditors.

By 1 and 2 Wm. IV. c. 56, s. 26, any conveyance to the assignees is rendered unnecessary, and the real estate of a bankrupt vests in his assignees, by virtue of their appointment.

An estate in reversion is also created by act of law.

As when a person has an interest in lands, and grants a portion of that interest, or in other terms, a less estate than he has in himself, the possessor of those lands shall on the determination of the granted interest or estate, return or revert to the grantor. And this is called a reversion.*

Estates in dower and curtesy, as also estates in coparcenary arise from the operation of legal principles, without requiring any deed for their creation.

Property may further be conveyed, or charged, by any of the modes mentioned post chapter ix.

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* Watk. Con., c. xvi., p. 188.

And by a recent statute real property is made liable for the payment of simple contract, as well as specialty, debts, whether the owner of it may so have directed or not.

Another mode in which a party's interest in property may terminate is by effluxion of time, a mode of transferring property, in which the law itself at the period prefixed or limited by the owner or some person from or through whom he claims, transfers the property to another; as, for example, in estates upon condition, or those created only for a limited period.

CHAPTER V.

THE ESTATE OR INTEREST WHICH MAY BE HAD IN PROPERTY, OR THE MODES AND TERMS OF HOLDING IT, WITH REFERENCE TO ITS DURATION, QUALITY, &c.

Section I. Of Estates of Freehold—Definition—Division of, by Common Law, into, 1, *Freeholds of Inheritance, Fee-simple, Absolute, Qualified, Fee-tail, General, Special, Male, Female—Freeholds not of Inheritance, as Tenant for Life, His own Life, Pour autre vie, Dower, Jointure, Curtesy.*

Section II. Less than Freehold—Terms for Years—Estates at Will, at Sufferance.

Section III. Estates by Custom, as Copyhold, Customary Freehold.

Section IV. Legal and Equitable Estates, or Interests—Division of Property into Legal and Equitable Estates peculiar to our Jurisprudence—Ought to be well understood—Uses not noticed at first by Courts of Common Law—Lord Bacon's Definition of what a Use is not—Mode of Creating it—Were devisable at Common

Law, when Lands were not—Uses productive of many evils—Stat. 27 H. VIII. passed to abolish them—Does not accomplish that object—Gives rise to new modes of Conveyance—Trusts—Definition of Trusts.

Equity and Common Law distinguished—Not opposite systems, but parts of one whole—Equity follows the Law—Trustees—Cestui que trusts.

STATE, or estate, signifieth such inheritance, freehold, term for years, or the like, as a man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass.*

Estates may be considered in a three-fold view.†

1. With regard to the duration of interest which the tenant has in his tenement. Of this the present chapter treats.

2. With regard to the time at which that quantity of interest is to be enjoyed, for which see chapter vi.

3. With regard to the number and connexion of the tenants. Post c. vii.

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* Co. Lit., 345, a.

† Bl. Com., bk. ii., c. vii., p. 103.

Division of Estates.

Estates by the Common Law or by custom, may properly be considered under one of two great divisions with reference to the interest which the tenant has in his tenement, viz.:—

1. Those of a freehold nature.
2. Those of a nature less than freehold.

Estates of a freehold nature are again divided into those which are of inheritance, and may consequently either be devised by the owner, or, on his dying intestate, go to his heir; and those which are not of inheritance, but in which the owner has no interest beyond the period of his own life, or the life of *cestui que vie, i. e.*, the person for or upon whose life the estate is held.

Estates of inheritance may be also divided into those of fee-simple, which may be absolute or qualified; and fee-tail, and this into tail general and special, male and female.

Estates of freehold not of inheritance, are those which the owner has for his own life only, or the life of another person.

Copyholds and Customary Freeholds.

Those less than freehold are leasehold, estates at will, and estates at sufferance.

Estates by custom, as copyholds, &c., may be subjected to a nearly similar division.

In any of these forementioned estates, the interest of a party may be of a legal or equitable nature.

In considering the various but important points of this chapter, the best order which suggests itself is to divide the chapter into four sections, devoting one section to each of the principal divisions referred to, and to treat of them in the following order:—

1. Of estates of freehold.
2. Of estates less than freehold.
3. Of estates by custom.
4. Of legal and equitable estates, or interests.

SECTION I.

1. *Of Estates of Freehold of Inheritance.*

Every one who hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold; but they of a greater estate have a freehold, for he in fee-simple hath a

freehold, and tenant in tail hath a freehold, &c.*

Tenant in fee-simple is he which hath lands or tenements to him and his heirs for ever.†

For if a man would purchase lands in fee simple, it behoveth him to have these words in his purchase, "to have and to hold to him and his heirs for ever.‡

And a man cannot have a more large or greater estate of inheritance than fee-simple.§ When a person grants away an estate in fee simple, he cannot make a further disposition of it, because he has already granted away the whole interest, consequently nothing remains in him.

From this estate in fee-simple, estates tail and all other particular estates are derived.‖

Tenant in fee-simple may create any inferior estate out of his own. He may also part with his entire interest. For power of

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* Lit., s. 57.
† Lit. Tenures, c. 1, s. 1.
‡ Co. Lit., 1, a.
§ Lit. s. 11.
‖ Co. Lit., 18, a.

alienation is an incident inseparably annexed to this estate, and any restriction upon it is void, as inconsistent with the nature of the estate.

Fee-simple is either, 1. Absolute; 2. Conditional; 3. Qualified; or, base.*

When an estate, limited to a person and his heirs, has a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end, it is then qualified or base fee.†

But the proprietor of a qualified or base fee has the same rights over his estate till the qualification upon which it is limited is at an end, as if he were tenant in fee-simple.‡

In cases of intestacy, fee-simple estates will descend to those who are the heirs-general of the intestate, whether male or female, lineal or collateral.

And by 3 & 4 W. IV., c. 104, freehold estates are in all cases to be assets for the

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* 1 Inst., 1, b.

† 1 Inst., 27, a.

‡ Plowd., 557.

payment not only of specialty but also of simple contract debts.

A man may have a fee-simple in three kinds of hereditaments, real, personal, and mixed. Real, as in lands and tenements; personal, as if an annuity be granted to a man and his heirs; mixed, as where the crown created an earl of such a county, or other place, to hold that dignity to him, and to his heirs; this dignity is personal, but it also concerneth lands and tenements, and is therefore mixed. *

A person may be tenant in fee-simple of an advowson as well as of a piece of land, in which case he and his heirs have a perpetual right of presentation. †

Tenant in fee-tail is, by force of the Stat. of West. ii., c. 1, for before the said statute, all inheritances were fee-simple; for all the gifts specified in that statute were fee-simple, conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute, tenant in tail is in two

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* Co. Lit., 2, a, 1, b. † 1 Inst., 322, b.

manners, that is to say, tenant in tail general and tenant in tail special.*

Tenant in tail general, is where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is said *general tail,* because whatsoever woman that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issue by possibility may inherit the tenements by force of the gift, because that every such issue is of *his* body engendered.†

Tenant in tail special is where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten.‡ And may be either male or female; the former, where land is given to a man and his heirs male; § the latter where lands or tenements are given to a man and his heirs female.‖

Tenements is the only word used in the statute Westm. II., but it includes not only

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* Lit., s. 13; and Co. Lit., 19, a.

† Sect. 14.

‡ Ibid., 16.

§ Lit., s. 21.

‖ Ibid., 22.

all corporeal inheritances that may be holden, but also all inheritances issuing out of such inheritances, or concerning or exerciseable within the same, though they be not in tenure; therefore all these without question may be entailed, as rents, estovers, profits, whatever granted out of the land, or uses, offices, dignities, which concern lands or certain places, may be entailed within the said statute, because all these savour of the realty.*

Lands given to a man and woman *unmarried* and the *heirs of their bodies* will be an estate tail special, for they *may marry*.†

Mere personal chattels which savour not at all of the realty cannot be entailed; neither can an office which merely relates to such personal chattels, nor an *annuity* which charges only the *person*, and not the *lands* of the grantor.

Neither can a copyhold be entailed by virtue of the statute, for that would tend to encroach upon and restrain the will of the

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* Co. Lit., 20, a. † Co. Lit., 25, b.

lord; but by the *special custom* of the manor a copyhold may be limited to the heirs of the body, for here the custom ascertains and interprets the lord's will.*

All *natural persons* capable of holding estates of inheritance in lands may be tenants in tail.

Estates tail, like estates in fee simple, have certain incidents inseparably annexed to them, which cannot be restrained by any proviso or condition whatsoever.

Tenant in tail has a right to commit every kind of waste, by felling timber, pulling down houses, opening and working mines, &c. But this power must be exercised during the life of tenant in tail, for at the instant of his death it ceases. If, therefore, a tenant in tail sells trees growing on the land the vendee may cut them down *during the life of the vendor*, otherwise they will descend to the heir as part of the inheritance.

Under the late Act, stat. 3 & 4 Wm. IV., c. 74, for abolishing fines and recove-

* 2 Bl. Com., 112.

ries, the tenant in tail may by any species of deed duly enrolled and otherwise made in conformity with the Act, absolutely dispose of the estate of which he is seised in tail, in the same manner as if he were absolutely seised in fee. If such assurance be in conformity, &c.

The Act requires the concurrence of the protector to enable the tenant in tail to make an absolute disposition of the entire fee so as to bar the estates in remainder dependant upon his estate tail.

2. Of Estates of Freehold not of Inheritance.

Tenant for term of life is where a man letteth lands or tenements to another for term of the life of the *lessee*, or for term of the life of *another man*. In this case the lessee is tenant for term of life. But by common speech he which holdeth for term of his *own* life is called tenant for term of *his* life; and he which holdeth for term of another life is called tenant for the term of another man's life, or tenant per terme d'autre vie.*

* Lit., 356.

Estates for life are of two sorts; either expressly created by deed or some other legal assurance, or deriving their existence from the operation of some principle of law.*

1. Of the former kind, the following instances may be given:—

If a man grant an estate to a woman *dum sola fuerit, durante viduitate,* or *quamdiu se bene gesserit, &c.;* in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery† be made: and if it be of rents, advowsons, or any things that lie in grant, he hath a like estate for life by livery of the deed.‡

Tenant for life hath a right to the full enjoyment and use of the land and all its profits during his estate therein. But he is

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* 2 Bl. Com., 121.

† And now by s. 2 of 7 & 8 Vict., c. 76, every person may convey by any deed, without livery, if seisin, or enrolment, or a prior lease, all such freehold lands as he might before the passing of that Act have conveyed by lease and release.

‡ Co. Lit., 42, a.

not permitted to cut down timber, or do other waste therein.

If one grant lands, or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or the grantee hath an estate for life.*

With respect to the words that are necessary to create an estate for life, those usually inserted for that purpose in deeds are—"To hold to the said A. B. and his assigns for and during the term of his natural life." But it has been already stated that if lands are conveyed to a natural person, without any words of limitation whatever, he will take an estate for his own life, unless the *grantor* be only tenant in tail, or tenant for *his own* life, in which cases the grantee will take an estate for the life of the grantor only.

Tenant for life hath a right to the possession and *annual produce* of the land during the continuance of his estate, without having the *proprietas*, that is, the absolute property and inheritance of the land itself, which is vested in some other person. If tenant for

* Co. Lit., 42, a.

life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God. And the same law is of lessee for years of tenant for life. So if a man be seised of land in right of his wife, and soweth the ground, and dieth, his executors shall have the corn.*

If tenant per terme d'auter vie soweth the ground, and cestui que vie dieth, lessee shall have the corn.

The word emblements only extends to such things as yield an annual profit.

He hath the power of alienating his whole estate and interest, or of creating out of it any less estate than his own, unless he is restrained by condition.

But though the tenant for life may not commit waste, he may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them.†

In the case of Papillon *v.* Voice‡ the Court of Chancery directed the title-deeds to be

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* Co. Lit., 55, b. † Co. Lit., 53, b.
‡ 2 P. Wms., 477.

taken from the tenant for life and deposited in court for the security of the person entitled to the inheritance. But from a review of all the cases upon the subject, it appears that the tenant for life has a right to the deeds to defend the possession, and in the case of a lease, to perform the covenants.*

Tenant in fee-tail, after possibility of issue extinct, is where tenements are given to a man and his wife in special tail, if one of them die without issue, the survivor is tenant in tail, after possibility of issue extinct.†

This estate may be held in anything in which an estate tail may be held, aud must be created by act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation conveyance, or other human act can make it.‡

Dower is the next estate to be considered as derived from the operation of law. It existed amongst the Germans, with whom it was a rule that the husband should allot a

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* Churchill *v.* Small, 8 Ves., 323, n.

† Lit., s. 32; Co. Lit. 27, b.

‡ Lewis Bowles' case, 11, Co., fo. 80, and Co. Lit., 28, a; 2 Bl. Com., 125.

part of his property for the maintenance of his wife, in case she survived him.

The most ancient charters in which we find it mentioned are those of 1217 and 1224, by which it is declared that dower consists of the third of all the lands which the husband held during his life unless the wife had been endowed of a smaller portion *ad ostium ecclesiæ.**

Dower has been defined to be an estate for life which the law gives the widow in the third part of the lands and tenements of the husband.

Littleton, in his tenures,‡ thus describes it. Tenant in dower is where a man is seised of certain lands or tenements in fee-simple, fee-tail general, or as heir in special tail, and taketh a wife and dieth, the wife, after the decease of her husband, shall be endowed, of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for

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* This species of dower, with that *ex assensu patris*, is now abolished by 3 & 4 Wm. IV., c. 105, s. 13.

† Cruise Dig. tit., Dower, c. 1. ‡ S. 26.

term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband.

And such provision is not only a legal, but a moral right, and one attaching at the instant of the marriage, though the estate does not come into possession till after the death of the husband. For per Sir Joseph Jekyll, in Hanks *v.* Sutton.* The relation of husband and wife, as it is the nearest, so it is the earliest; and therefore the wife is the proper object of the care and kindness of the husband. The husband is bound by the law of God and of man, to provide for her during his life, and after his death the *moral obligation* is not at an end; but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture the wife can acquire no property of her own.

It is not a new estate, but a continuation of that which the husband had, and hence dower is incident only to estates of inheritance, and not to those which the husband has

* 2 P. Wms., 702.

for life only, and which consequently do not continue to his representatives after his decease.*

The three requisites formerly absolutely necessary to intitle a woman to dower were,

1. Marriage.
2. Seisin by the husband.
3. The death of the husband.

The second of these is now done away with in cases of marriages taking place on or after January 1, 1834, by 3 & 4 Wm. IV., c. 105, ss. 2 and 3, which provide that seisin shall not be necessary to give title to dower; and that "when a husband shall die beneficially entitled to any land, for an interest which shall not entitle his widow to dower out of the same at law, and such interest whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land."

The first and the third requisite, however,

* Hooker *v.* Hooker. Ca. Temp. Hard. 13.

still remain, for there must be a marriage, and that marriage must be between parties legally capable of contracting, otherwise there is no marriage, and it is an ancient and well-established maxim of law, *ubi nullum matrimonium, ibi nulla dos.**

A woman then is not only dowable of all lands of which the husband was sole seised during the coverture, but is now entitled to dower out of equitable estates also.†

It has also been held that shares in the navigation of the River Avon,‡ so far partake of the nature of land, that the widow is dowable in respect of them.§ She is likewise dowable of several incorporeal hereditaments, such as advowsons, tithes, commons, offices, franchises, and rents, but not of a personal annuity given to her husband and his heirs.‖

But the sole seisin of the husband during the coverture, and that too of an estate of

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* 1 Inst., 32, a.

† 3 and 4 W. IV., c. 105, s. 2.

‡ Buckeridge *v.* Ingram, 2 Ves., 652.

§ 1 Inst., 31, a. ‖ Co. Lit., 32, a.

inheritance, was till the recent statute, indispensably necessary.*

It was therefore a frequent practice to convey the estate to trustees on behalf of the purchaser, or to give him only a power of appointment, or only an estate for life.

Upon the husband's death, the right to dower which the wife acquires by marriage becomes consummate, but the widow has no estate till assignment, as the law casts the freehold upon the heir immediately on the death of the ancestor.†

In assigning dower, the Court of Chancery allows the widow an account of mesne profits from the death of the husband. ‡

But by a recent statute § it is enacted "that after the 31st day of December, 1833, no arrears of dower nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer

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* 3 & 4 W. IV. c. 105.

† Co. Lit., 34, b.

‡ Curtis *v.* Curtis, 2 Bro. C. C. 620.

§ 3 & 4 W. IV., c. 27, s. 41.

period than six years next before the commencement of such action or suit."

Jointure.

Though the claim of the widow to a competent provision from the estate of her deceased husband being founded on moral as well as legal right, seems to have been favourably viewed both by the courts of law and the Legislature, still as it tended greatly to impede the alienation of freehold estates, and to clog the title with fresh difficulties, various methods were resorted to, either to prevent the right from arising, or to bar the right when it had accrued.

One very common way was by means of a jointure settled on the wife before marriage which prevented the title to dower from ever arising.

An estate in jointure is defined* to be a competent livelihood of freehold for the wife, of lands or tenements to take effect presently in possession, or profit after the decease of her husband, for the life of the wife at the

* 1 Inst., 37, a.

least, if she herself be not the cause of its determination or forfeiture.

But even whilst the above was true at law, it was decided and settled in equity, that a trust estate being equally certain and beneficial as what was required at law, or even an agreement to settle lands as a jointure, was a good equitable jointure and would be a bar to dower.*

A jointress in equity is considered a purchaser for a valuable consideration, and will be relieved in equity, as also at law, against any prior voluntary conveyance.†

And jointure, whether legal or equitable, is a good bar to the claim of a widow to free bench of a copyhold, as well as to dower.‡

Dower might have been barred after marriage, by fine or recovery, till 3 and 4 W. IV., c. 74, and since then by the modes thereby substituted. And if the husband had bequeathed certain property in lieu and satisfaction of dower, or on condition that

* Bucks *v.* Drury, 5 Bro., P. C. 570.

† Hagner *v.* Hagner, 1 Vent., 343; Cru. Di. Dower, c. 2.

‡ Walker *v.* Walker, 1 Ves., S. 54.

the wife shall not claim dower, then the wife cannot have both, for that would be repugnant to the intentions of the testator. The wife must therefore in such cases make her election.*

The mere bequest of personal estate would not be considered as a bar to dower, unless so expressed;† and there are cases which go the length of showing that the devise of any thing, either entirely or partly charged on the estate of which she is endowable, is not a satisfaction of dower, but the widow has been allowed to have both.‡

3 & 4 W. IV., c. 105, s. 10, enacts, that "no gift or bequest made by any husband, to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will."

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* Leake *v.* Randall, 4 Rep.

† Ayers *v.* Willis, 1 Ves., 230.

‡ Foster *v.* Cook, 3 Bro., C. C. 347; Greatorex *v.* Carey, 6 Ves., 615; French *v.* Davies, 2 Ves., 572.

And the same Act contains the following provisions :—

s. 4. That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband, in his lifetime or by will.

s. 5. That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

s. 6. That a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such lands.

s. 7. That a widow shall not be entitled to dower out of any land of which her husband shall die wholly seised or partially intestate, when by the will of her husband duly executed for the devise of freehold estate he shall declare his intention, that she shall not

be entitled to dower out of such land, or out of any of his land.

s. 8. That the right of a widow to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by the will of her husband duly executed as aforesaid.

s. 9. That where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Curtesy.

Tenant by the curtesy of England is where a man taketh a wife, seised in fee-simple or in fee-tail general, or seised as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife die the husband shall hold the land during his life by the law of England; and he is called

tenant by the curtesy of England, because this is used in no other realm, but in England only.*

An estate by the curtesy like that in dower, arises by act of law, and is an estate of *freehold.*†

Money to be laid out in land is subject to curtesy, on the principle that equity holds that money directed to be laid out in land should be considered as land.‡

Copyholds are not liable to curtesy by the *Common Law*, but there are many manors in which the husband of a female copyholder is by *particular custom* entitled to his wife's estate if he survives her.

It is no more than a bare estate for life, nor has this tenant any more privileges than tenant for life. It is considered as a continuation of the wife's estate in many respects, therefore the husband is entitled to all those rights and privileges which his wife would have had if she was alive.

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* Co. Lit., 29, a.; Lit. 35. † Watk. 54.

‡ 2 Sweetapple *v.* Binden, Vern., 536.

No entry is necessary to complete this estate.

SECTION II.

Of Estates less than Freehold.

Tenant for term of years is where a man letteth lands or tenements to another for term of certain years after the number of years that is accorded between the lessor and the lessee, and the lessee entereth by force of the lease, then is he tenant for years.*

And if an agreement be made for the possession of lands for half-a-year, or a quarter, or any less time, the lessee is considered as tenant for years, and is so styled in all legal proceedings. A year being the shortest period of which the law will in this case take notice.†

A term from its very nature must have a certain beginning or definite commencement, and a certain and definite period beyond which it cannot last. But though it be es-

* Lit., s. 58. † 2 Bl. Com., 140; Lit., s. 67.

sential to its very existence that there be a time absolutely prefixed beyond which it cannot continue, yet it may be made subject to a condition, for its determination before the period prefixed, depending upon the dropping of a life or lives, or any other contingent event, as *e. g.*, for ninety-nine years, if B so long live. Here, if A B die before the ninety-nine years expire the term shall cease; but though A B should survive the ninety-nine years, the lease on the expiration of the ninety-nine years would be absolutely at an end.*

The estate is usually styled a *demise* or *lease*, but it is rather the mode of creation, which is styled a *demise lease*, and the estate itself is called a *term*. Sometimes, indeed, the word lease is used synonymously with the word term; and the proper words of creation are those of "*demise*, lease, and to farm, let," though it may be created by other means, as by bargain and sale, though without enrolment.

And now, by 7 & 8 Vict. c. 76, s. 4,

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* Watkin's Prin., c. ii.

it is enacted that no lease in writing of any freehold, copyhold, or leasehold land, or surrender in writing of any freehold or leasehold land, shall be valid as a lease, or surrender, unless the same shall be made by deed. But any agreement in writing to let or to surrender any such land shall be valid, and take effect as an agreement to execute a lease or surrender. And the person who shall be in the possession of the land in pursuance of any agreement to let, may, from payment of rent or other circumstances, be construed to be a tenant from year to year. And by sec. 3, no partition, or exchange, or assignment of any freehold or leasehold land shall be valid *at law*, unless the same shall be made by deed.

An estate for years is what the law calls a *chattel interest*, and is not an estate of freehold, though it be for ten thousand years.

This estate is assignable by the lessee, unless there be an express proviso or condition in the lease to restrict the power of alienation which the law gives; and such assignment may be made even before the lessee enters; or if the lease be made to

two, one may re-lease to the other before entry.

And as a lessee may grant over his whole term, so he may make an under lease of a part of his interest, as if he have a term for ten years, he may underlet for five, &c.; and the distinction between an assignment and an underlease is, where the lessee parts with his whole interest, and where not. In the latter case it is an underlease; in the former, an assignment.*

Every tenant for years has incident to, and inseparable from, his estate, the same estovers to which tenants for life are entitled, unless restrained by special agreement.†

Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him.‡ If a man letteth

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* Watk. c. 2. † Co. Lit., 41, b.

‡ Lit., s. 68.

lands to another to have and to hold to him, and to his heirs, at the will of the lessor, the words to the *heirs of the lessee* are void; for if the lessee dies and the heir enters, the lessor shall have an action of trespass against him.* And there are divers diversities between tenant at will, which is in by lease of his lessor, by the course of the Common Law, and tenant, according to the custom of the manor aforesaid. For tenant at will may have an estate of inheritance at the will of the lord, according to the custom and usage of the manor.†

A tenant from year to year having acquired the possession by the consent of the owner, as well as tenant at will, there is a privity of estate between them.

The Courts of Law have of late years leaned as much as possible against construing demises where no certain term is mentioned to be estates *at will*, but have rather held them to be estates from *year to year*, as long as both parties please, especially when an

* Lit., s. 82. † Co. Lit., 62, b.

CHAPTER IV.

HOW INTEREST IN PROPERTY MAY COMMENCE OR TERMINATE.

The interest of any person in Property may commence or terminate in divers ways—1. *By act of God, as by death of owner, or cestui que vie, by inundation.* 2. *By act of the Law, as in cases of Intestacy, Bankruptcy, Insolvency, Reversions, Estates in Dower, Curtesy, Tenant in Tail after possibility of issue extinct.*

PROPERTY may cease to belong to its owner by various means; *e. g.*, by act of God; as by the death of the owner, or of the party for whose life he held or was entitled to property; as where the tenant for another man's life by his deed grants a rent-charge for one-and-twenty years and *cestui que vie; i. e.*, he for whose life the grantor of the annuity held the estate, dieth, the rent-charge thereby becomes extinguished;* by

* Co. Lit., 148, a.

inundations, by encroachments of the sea;* or by other modes which emanate not from the volition of the party, or act or operation of the law.

And where tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God.†

And the same law is of lessee for years of tenant for life. So if a man be seized of land in right of his wife, and soweth the ground and dieth, his executors shall have the corn.

2. By act of the law; as in cases of the intestacy, insolvency, bankruptcy, or felony of its owner, in cases also of reversions, in each of which instances the property, without any act on the part of the owner so dying intestate, becoming insolvent or bankrupt, or committing felony, passes away from him to other persons.

Intestacy, as we shall see more fully hereafter, is where a party dies without making a will or testament; *i.e.*, without any legal

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* Thomas i., 469, n. G., i. Co. Lit., 53, b.

† Co. Lit., 55, b.

declaration of his intentions which he wills or wishes to be performed after his decease in respect of his property.

A will or testament is a solemn act or instrument, whereby a person declares his mind and intention as to the disposal of his lands, goods, or effects, and what he would have done after his death.*

He who makes the testament is called the testator, and when a man dies without a will, he is said to die intestate.

3. By bankruptcy.

A bankrupt is defined as "a trader who secretes himself, or does certain other acts tending to defraud his creditors." †

The first statutory enactment upon the subject made concerning English bankrupts, is 3 and 4 Henry VIII. c. 4, when trade began first to be properly cultivated in England, and from that time to the present, various and extensive alterations have been made in this very important department of the law.

By virtue of which a bankrupt loses all his real estates, which are at once transferred

* Co. Lit., 111, a. † 2 Bl. Com., 285.

to others, to be disposed of for the benefit of his creditors.

By 1 and 2 Wm. IV. c. 56, s. 26, any conveyance to the assignees is rendered unnecessary, and the real estate of a bankrupt vests in his assignees, by virtue of their appointment.

An estate in reversion is also created by act of law.

As when a person has an interest in lands, and grants a portion of that interest, or in other terms, a less estate than he has in himself, the possessor of those lands shall on the determination of the granted interest or estate, return or revert to the grantor. And this is called a reversion.*

Estates in dower and curtesy, as also estates in coparcenary arise from the operation of legal principles, without requiring any deed for their creation.

Property may further be conveyed, or charged, by any of the modes mentioned post chapter ix.

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* Watk. Con., c. xvi., p. 188.

And by a recent statute real property is made liable for the payment of simple contract, as well as specialty, debts, whether the owner of it may so have directed or not.

Another mode in which a party's interest in property may terminate is by effluxion of time, a mode of transferring property, in which the law itself at the period prefixed or limited by the owner or some person from or through whom he claims, transfers the property to another; as, for example, in estates upon condition, or those created only for a limited period.

CHAPTER V.

THE ESTATE OR INTEREST WHICH MAY BE HAD IN PROPERTY, OR THE MODES AND TERMS OF HOLDING IT, WITH REFERENCE TO ITS DURATION, QUALITY, &c.

Section I. Of Estates of Freehold—Definition—Division of, by Common Law, into, 1, *Freeholds of Inheritance, Fee-simple, Absolute, Qualified, Fee-tail, General, Special, Male, Female—Freeholds not of Inheritance, as Tenant for Life, His own Life, Pour autre vie, Dower, Jointure, Curtesy.*

Section II. Less than Freehold—Terms for Years—Estates at Will, at Sufferance.

Section III. Estates by Custom, as Copyhold, Customary Freehold.

Section IV. Legal and Equitable Estates, or Interests—Division of Property into Legal and Equitable Estates peculiar to our Jurisprudence—Ought to be well understood—Uses not noticed at first by Courts of Common Law—Lord Bacon's Definition of what a Use is not—Mode of Creating it—Were devisable at Common

Law, when Lands were not—Uses productive of many evils—Stat. 27 H. VIII. passed to abolish them—Does not accomplish that object—Gives rise to new modes of Conveyance—Trusts—Definition of Trusts.

Equity and Common Law distinguished—Not opposite systems, but parts of one whole—Equity follows the Law—Trustees—Cestui que trusts.

STATE, or estate, signifieth such inheritance, freehold, term for years, or the like, as a man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass.*

Estates may be considered in a three-fold view.†

1. With regard to the duration of interest which the tenant has in his tenement. Of this the present chapter treats.

2. With regard to the time at which that quantity of interest is to be enjoyed, for which see chapter vi.

3. With regard to the number and connexion of the tenants. Post c. vii.

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* Co. Lit., 345, a.

† Bl. Com., bk. ii., c. vii., p. 103.

Division of Estates.

Estates by the Common Law or by custom, may properly be considered under one of two great divisions with reference to the interest which the tenant has in his tenement, viz.:—

1. Those of a freehold nature.
2. Those of a nature less than freehold.

Estates of a freehold nature are again divided into those which are of inheritance, and may consequently either be devised by the owner, or, on his dying intestate, go to his heir; and those which are not of inheritance, but in which the owner has no interest beyond the period of his own life, or the life of *cestui que vie, i. e.,* the person for or upon whose life the estate is held.

Estates of inheritance may be also divided into those of fee-simple, which may be absolute or qualified; and fee-tail, and this into tail general and special, male and female.

Estates of freehold not of inheritance, are those which the owner has for his own life only, or the life of another person.

Copyholds and Customary Freeholds.

Those less than freehold are leasehold, estates at will, and estates at sufferance.

Estates by custom, as copyholds, &c., may be subjected to a nearly similar division.

In any of these forementioned estates, the interest of a party may be of a legal or equitable nature.

In considering the various but important points of this chapter, the best order which suggests itself is to divide the chapter into four sections, devoting one section to each of the principal divisions referred to, and to treat of them in the following order:—

1. Of estates of freehold.
2. Of estates less than freehold.
3. Of estates by custom.
4. Of legal and equitable estates, or interests.

SECTION I.

1. *Of Estates of Freehold of Inheritance.*

Every one who hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold; but they of a greater estate have a freehold, for he in fee-simple hath a

freehold, and tenant in tail hath a freehold, &c.*

Tenant in fee-simple is he which hath lands or tenements to him and his heirs for ever.†

For if a man would purchase lands in fee simple, it behoveth him to have these words in his purchase, "to have and to hold to him and his heirs for ever.‡

And a man cannot have a more large or greater estate of inheritance than fee-simple.§ When a person grants away an estate in fee simple, he cannot make a further disposition of it, because he has already granted away the whole interest, consequently nothing remains in him.

From this estate in fee-simple, estates tail and all other particular estates are derived.‖

Tenant in fee-simple may create any inferior estate out of his own. He may also part with his entire interest. For power of

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* Lit., s. 57.
† Lit. Tenures, c. 1, s. 1.
‡ Co. Lit., 1, a.
§ Lit. s. 11.
‖ Co. Lit., 18, a.

alienation is an incident inseparably annexed to this estate, and any restriction upon it is void, as inconsistent with the nature of the estate.

Fee-simple is either, 1. Absolute; 2. Conditional; 3. Qualified; or, base.*

When an estate, limited to a person and his heirs, has a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end, it is then qualified or base fee.†

But the proprietor of a qualified or base fee has the same rights over his estate till the qualification upon which it is limited is at an end, as if he were tenant in fee-simple.‡

In cases of intestacy, fee-simple estates will descend to those who are the heirs-general of the intestate, whether male or female, lineal or collateral.

And by 3 & 4 W. IV., c. 104, freehold estates are in all cases to be assets for the

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* 1 Inst., 1, b.

† 1 Inst., 27, a.

‡ Plowd., 557.

payment not only of specialty but also of simple contract debts.

A man may have a fee-simple in three kinds of hereditaments, real, personal, and mixed. Real, as in lands and tenements; personal, as if an annuity be granted to a man and his heirs; mixed, as where the crown created an earl of such a county, or other place, to hold that dignity to him, and to his heirs; this dignity is personal, but it also concerneth lands and tenements, and is therefore mixed. *

A person may be tenant in fee-simple of an advowson as well as of a piece of land, in which case he and his heirs have a perpetual right of presentation. †

Tenant in fee-tail is, by force of the Stat. of West. ii., c. 1, for before the said statute, all inheritances were fee-simple; for all the gifts specified in that statute were fee-simple, conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute, tenant in tail is in two

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* Co. Lit., 2, a, 1, b. † 1 Inst., 322, b.

manners, that is to say, tenant in tail general and tenant in tail special.*

Tenant in tail general, is where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is said *general tail*, because whatsoever woman that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issue by possibility may inherit the tenements by force of the gift, because that every such issue is of *his* body engendered.†

Tenant in tail special is where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten.‡ And may be either male or female; the former, where land is given to a man and his heirs male; § the latter where lands or tenements are given to a man and his heirs female.‖

Tenements is the only word used in the statute Westm. II., but it includes not only

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* Lit., s. 13; and Co. Lit., 19, a.

† Sect. 14.

‡ Ibid., 16.

§ Lit., s. 21.

‖ Ibid., 22.

all corporeal inheritances that may be holden, but also all inheritances issuing out of such inheritances, or concerning or exerciseable within the same, though they be not in tenure; therefore all these without question may be entailed, as rents, estovers, profits, whatever granted out of the land, or uses, offices, dignities, which concern lands or certain places, may be entailed within the said statute, because all these savour of the realty.*

Lands given to a man and woman *unmarried* and the *heirs of their bodies* will be an estate tail special, for they *may marry*.†

Mere personal chattels which savour not at all of the realty cannot be entailed; neither can an office which merely relates to such personal chattels, nor an *annuity* which charges only the *person*, and not the *lands* of the grantor.

Neither can a copyhold be entailed by virtue of the statute, for that would tend to encroach upon and restrain the will of the

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* Co. Lit., 20, a. † Co. Lit., 25, b.

conscience, however, was affected. To this the reason of mankind assented, and it has stood on this footing ever since, and by this means a statute, made upon great consideration, introduced in a solemn and pompous manner, by this strict construction has had no other effect than to add at most three words to a conveyance.*

Thus, the strict construction which the Judges put upon that statute, in a great measure defeated its effects, as they determined there were some uses to which the statute did not transfer the possession, so that uses were not entirely abolished, but still continued distinct and separate from the legal estate, and were taken notice of and supported by the Court of Chancery, under the name of trusts, which may be thus defined.†

A trust estate is a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person, and to compel the person thus seised of the

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* Hopkins *v.* Hopkins, 1 Atk., p. 591.

† Vaugh, R. 50; 1 Atk., R. 591.

legal estate, who is called the trustee, to execute such conveyances of the land, as the person entitled to the profits, who is called the *cestui que trust*, shall direct and to defend the title of the land.*

Thus much then of uses and trusts which are the subject of equitable jurisdiction.

It seems desirable, however, that something should here be said on the subject of equity and the grounds of equitable interference.

Equity is not what some seem to have imagined it, a system diametrically opposite to law. Indeed it may be considered more as supplementary and auxiliary to it. Thus, when an estate is purchased in the name of one person, and the consideration is given or paid by another, the rules of equity step in and decide that there is a resulting trust in favour of the persons giving or paying the money.†

And it has been determined that evidence

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* Cruise Dig., tit. xii., c. 1, s. 3.

† 1 Vern., 109.

aliunde is admissible to shew that the purchase was made with the trust-money, and where that circumstance has been clearly proved a trust will result to the person entitled to the money.*

Courts of common law recognise the legal title only. Equitable interests are the creatures of equity, and almost all arrangements and transactions respecting them fall under the special jurisdiction and cognisance of the Courts of Chancery.

Whatever would be the rule of law if it was a *legal* estate, is applied in equity to a *trust* estate.†

Equity follows the law, is a safe as well as a fixed principle, for it makes the substantial rules of property certain and uniform be the mode of following it what it will.‡

The legal estate or interest is that which the law acknowledges, and which can be proceeded for, and enforced in the courts of common law.

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* Ryal *v.* Ryal, Amb., 413, and 1 Atk., 59.

† 1 Eden, 223. ‡ 2 Brown, C. C., 271.

Equitable estates or interests, on the other hand, are those which the law does not recognise, but are taken notice of, and enforced by courts of equity.

And Courts of Chancery will compel trustees,

1. To permit the *cestui que trust* to receive the profits of the land.

2. To execute such conveyances as the *cestui que trust* shall direct.

3. To defend the title of the land in any court of law or equity.*

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* Cruise Dig., tit. xii., c. 4, s. 1.

CHAPTER VI.

TIME AND MODE OF HOLDING PROPERTY, AS REGARDS THE COMMENCEMENT, CONTINUANCE, AND TERMINATION OF THE OWNER'S ESTATE OR INTEREST.

Estates may be in possession, remainder, or reversion—Definitions of—The particular estate and the remainder, are part of one whole—Remainders are vested, or contingent—Definitions of—Mr. Fearne quoted—Rules for creating a good remainder—Recent Statute 7 & 8 Vic., c. 76, s. 8—In future contingent remainders abolished—Those existing may be conveyed by deed—Of executory devises—Are always created by will—Differ from remainders in three important points—Of a reversion—Definition of—Is never created by deed, but arises by construction of law.

It is proposed in this chapter to consider estates with regard to the time of their enjoyment, or coming into possession, *i. e.*,

when the actual pernancy of the profits, by the perception or receipt of the rents and other advantages arising from them, begins.

Estates, with respect to this consideration, may be either in possession or in expectancy; and of expectancies there are two sorts, one created by the act of the parties called a remainder, the other by act of law and called a reversion.

Of estates in possession there is little or nothing to be said. All the estates we have hitherto spoken of are of this kind, for in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. An estate in possession is where the tenant is entitled to the actual pernancy or receipt and enjoyment of the profits.

But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require the student's minute attention.*

* Bl. Com., vol. ii., 164.

An estate in remainder may be defined to be, in the language of Blackstone, an estate limited to take effect after another estate is determined.* Or, according to Mr. Watkins, it is that portion of interest which on the creation of a particular estate is limited over to another.†

Thus, if a man seised in fee-simple grant lands to A for twenty years, and after the determination of the said term, then to B and his heirs for ever; here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A, and the residue and remainder of it is given to B. But both of these interests are in fact only one estate, the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.‡

They are indeed different parts, but they constitute only one whole, they are carved out of one and the same inheritance; they

* 2 Bl. Com., 164; Co. Lit., 49, a.

† Principles, c. xiii., p. 158.

‡ Co. Lit., 143.

are both created, and may both subsist together, the one in possession the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term, to B for life, and after the determination of B's estate for life, it be limited to C and his heirs for ever, this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A's estate for years carved out of it, and after that B's estate for life, and then the whole that remains is limited to C and his heirs. And here also the first estate and both the remainders for life and in fee are one estate only, being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal to the whole. Hence also it is easy to collect that no remainder can be limited after the grant of an estate in fee-simple,* because a fee-simple is the highest

* 2 Bl. Com., 169; Plow., 29; Vaugh., 269.

and largest estate that a subject is capable of enjoying, and he that is tenant in fee hath in him the whole of the estate; a remainder, therefore, which is only a portion or residuary part, cannot be reserved after the whole is disposed of.

A particular estate with all the remainders expectant thereon is only one fee-simple, as £40 is part of £100, and £60 is the remainder of it; wherefore after a fee-simple, once vested, there can no more be a remainder limited thereon, than after the whole £100 is appropriated there can be any residue subsisting.*

Remainders, then, are further either *vested* or *contingent.* Vested remainders (or remainders executed, whereby a present interest passes to the party though to be enjoyed *in futuro*), are where the estate is invariably fixed to remain to a determinate person after the particular estate is determined; as if an estate be limited to A for twenty years, remainder to B in fee: here B's is a *vested* remainder, which nothing can defeat or set aside, it being absolutely fixed, independ-

* 2 Bl. Com., 164.

ently of any circumstance or event to remain in B after the expiration of A's term.

Mr. Fearne, in his elaborate work on remainders,* says, "an estate is vested when there is an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment. An estate is vested in interest when there is a present fixed right of future enjoyment. An estate is contingent when a right to enjoyment is to accrue on an event which is dubious and uncertain."

It has been before observed, that every remainder created by deed must have some particular estate to support it. When there is no person in *esse* in whom the freehold is vested, it is said to be in abeyance, i.e., in expectation, remembrance, or contemplation of the law.†

This principle is of the highest legal antiquity, and the grounds of it are to be looked for in the feudal law.

If an estate be limited to A for like re-

* Introd., p. 1. † 1 Inst., 342, b.

mainder to the right heirs of B, the fee-simple is in abeyance during the life of B, because it is a maxim of law *nemo est hæres viventis.**

In consequence of this doctrine it is a rule that a freehold estate cannot by any conveyance operating at common law be created to commence *in futuro*, except by way of remainder,† and to support a remainder, there must be an immediate preceding particular estate.

In an executory devise, however, an estate in freehold may be conveyed so as to commence *in futuro:* but in such cases the freehold does not continue in abeyance, for till the estate so limited take effect in the case of a *devise*, it descends to the heir at law of the testator, and in that of a *deed*, results to, or remains in the grantor.‡

Contingent or executory remainders (whereby no present interest passes) are when the estate in remainder is limited to

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* 1 Inst., 342, a. † 1 Inst., 217, a. Fearne Com. Rem., 351, 353.

take effect either to a dubious or uncertain person, or upon a dubious or uncertain event, so that the particular estate may chance to be determined at the time when the remainder is limited to take effect, in which case, for reasons which will appear hereafter, the remainder can never take effect at all.*

In order to the creation of a good remainder, the following rules must have been observed prior to the recent enactment.†

1. It was essential that there should be some particular estate, precedent to the estate in remainder.‡

This was called the particular estate, as being only a small part or *particula* of the inheritance, the residue or remainder of which was granted over to another.

2. A second rule to be observed in the creation of a remainder was, that the remainder must commence or pass out of the

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* 2 Bl. Com., 169; 3 Rep., 20; Watk. Princ., 51; Elements of Conveyancing, vol. iii., p. 492.

† 7 & 8 Vict., c. 76, s. 8.

‡ Co. Lit., 49; Plow., 25.

grantor at the time of the creation of the particular estate.*

3. A third rule respecting remainders was, that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti*, that it determined.†

It was upon these rules, but principally the last, that the doctrine of contingent remainders depended.

A remainder limited either to a dubious or uncertain person, as if an estate be made to A for life, remainder to the heirs of B; or second, upon a dubious or uncertain event, as to A for life, and in case B survives him, then remainder to B in fee, was in either of these cases a contingent one.

For if, in the case first put, A had died before B's son was born, the remainder would have been absolutely gone, by the determination of the particular estate before the remainder could vest. And in the latter case, if B dies before A, the estate can never vest in the heirs of B, but is gone for ever.

But in devises by last will and testament,

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s. 671. †2 Bl. Com., 167; Plow., 25; 1 Rep., 66.

remainder may be created in some measure contrary to the rules before laid down, though our lawyers will not allow such dispositions to be strictly remainder, but call them by another name, viz., that of *executory devises*, or devises hereafter to be executed.*

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency.

It differed from a remainder in three very material points. 1. That it needs not any particular estate to support it. Thus, if one devise land to a *feme sole* and her heirs upon her day of marriage; here is a freehold commencing in *futuro*, and till the event happens, the estate will descend to the heir. This limitation, though it would be void in a deed, is yet good in a will by way of executory devise.†

2. That by it a fee-simple, or other less estate, may be limited after a fee-simple, as if a man devises lands to A and his heirs, but

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* 2 Bl. Com., 172. † 1 Sid., 153.

if he dies before the age of twenty-one, then to B and his heirs; this also, though void in a deed, is good by way of executory devise.*

3. That by this means a remainder may be limited of a chattel interest, after a particular estate for like created in the same. *e. g.*, a term of years may thus be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed, for by law the first grant of it to a man for life was a total disposition of the whole term, a life estate being esteemed of a higher and larger nature than any term of years.†

And now it will be seen, that what would hitherto have been a contingent remainder, will, since 7 & 8 Vict., c. 76, in many cases be an executory devise.‡

The 7 & 8 Vict., c. 76, has made great alterations upon the subject of contingent remainders. S. 8 enacts, that after the 31st day of Decem-

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* 2 Mod., 289.

† 2 Bl. Com., 172.

‡ See post, Appendix.

ber, 1844, "no estate in land shall be created by way of contingent remainder; but every estate which before that time would have taken effect as a contingent remainder, shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties as an executory devise. And contingent remainders existing under deeds, wills, or instruments executed or made before the time when this Act shall come into operation, shall not fail, or be destroyed, or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine." By the fifth section of 7 & 8 Vict., c. 76, contingent or executory interests in freehold, copyhold, or leasehold land, or personal property, may be conveyed, assigned, or charged by any deed.

Of Reversions.

An estate in reversion is the residue of an

estate left in the grantor to commence in possession after the determination of some particular estate granted out by him,* or the returning of land to the grantor or his heirs after the grant is over.†

A reversion is never created by deed or writing, but arises from construction of law. A remainder, on the other hand, can never be limited unless by deed or devise, and the proper mode of conveyance of a reversion is by grant, though it would equally pass by lease and release, and since the recent statutes,‡ by release alone, or covenant to stand seised.

The incidental rights of the reversioner and the respective modes of descent in which remainders very frequently differ from reversions, have occasioned the *law* to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them.

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* Co. Lit., 22, b.; Plow., 151.

† 1 Inst., 142, b.

‡ 4 & 5 Vict., c. 20; and 7 & 8 Vict., c. 76.

CHAPTER VII.

OF THE TIME AND MODE OF HOLDING PROPERTY AS REGARDS THE NUMBER AND CONNEXION OF THE TENANTS.

Of the number and connexion of the tenants—1. *Of estates in severalty—Definition*—2. *Of joint tenancy—Definition—Created by purchase—Nature of the estate—Four incidents to its creation, viz.*, (1.) *Unity of interest*—(2.) *Unity of title*—(3.) *Unity of time*—(4.) *Unity of possession—Of the jus accrescendi, or right of survivorship—Gift to husband and wife and another in joint tenancy—Courts of equity adverse to*—3. *Coparcenary—Always by descent—Coparceners may make partition—Provisions of* 3 *&* 4 *Wm. IV., c.* 27, *s.* 12, *as to entry of one being the entry of all—Tenants in common always by purchase hold by distinct titles—Estate descends to the heirs of each.*

Estates in Severalty.

THIS chapter suggests a fourfold division in which will be briefly treated of in order,

1. Estates in severalty.
2. Estates in joint tenancy.
3. Estates in coparcenary.
4. Estates in common, together with some of the incidents peculiar to each.

Sir William Blackstone thus defines an estate in severalty.

He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.* To the like effect also is the following definition given by Mr. Cruise, in his Digest:—

When a person holds lands in his own right only, without having any other joined with him in point of interest during the estate therein he is said to hold in severalty.†

Joint Tenancy.

An estate in joint tenancy, is where lands or tenements are granted to two or more

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* Bl. Com., vol. ii., 179. † Cruise Dig., tit. xviii., c. i., s. 2.

persons to hold in fee-simple, fee-tail, for life, for years, or at will.* In which case, if there be no words of explanation to show that the grantees were intended to have a several interest, they will take a joint estate, and are denominated joint tenants.

Joint tenants always take by *purchase*, and the proper and best mode of creating an estate in joint tenancy is to limit it to "A B, and C, D, and their heirs," if in fee.

The limitation sometimes made to A B and C D, and the survivors of them, and the heirs of each survivor, is objectionable, as if there be nothing to control the legal operation of the terms, they would give a *contingent remainder to the survivor.*

In the creation of a joint tenancy, it is not only necessary that the estate to the same persons be limited by the same deed, but the estate in them must *vest* at one and *the same time;* for if an estate be limited to A for life, with remainder to the heirs of B and C, (B and C being supposed to be living), and B die during the particular

* Lit., s. 277.

estate when one moiety would vest in his heirs, and afterwards C die in the lifetime of A, when the other moiety would vest in his heirs, the heirs of B and C would take in common.

As joint tenants are to all intents and purposes seised "*per mie* and *per tout*," they cannot grant nor bargain and sell, nor surrender, nor devise to each other, nor can one of them *enfeoff his companions.*

But each may sever the tenancy at his pleasure, by granting his portion over to a stranger, either to the use of such stranger, or to the use of himself by the usual mode of conveying a freehold, or compel a partition by statute, or one may *release to his companion.*

Joint tenants, however, may exchange with a stranger, or surrender to an immediate reversioner.*

The nature of a joint tenancy requires the following circumstances in order to its creation :—

1. Unity of interest.

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* Wat. Conv., 153.

2. Unity of title.

3. Unity of time.

4. Unity of possession.

Or, in other words, they must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.*

1. As to unity of interest, Lord Coke lays it down, that one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in fee-tail.†

2. Unity of title is not less essential, whether it be acquired by a legal, or an illegal act, than unity of possession;‡ for if they had different titles one might prove good and the other bad, and this would absolutely destroy the jointure.

3. As to time, the estate must by limitations of common law, become vested in all the joint tenants at one and the same instant, as well as by one and the same title.‡ For if lands be devised for life, the remainder to

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* 2 Bl. Com., 180. † 1 Inst., 188, a.

† Lit., 278.

‡ 1 Inst., 188, a; 2 Bl. Com., 180.

the right heirs of J. S., and of J. N., J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety is vested at one time, and the other moiety vested at another time.

4. Unity of possession. Joint tenants are said to be seised *per mie* and *per tout*, by the half or moiety, and by all; *i. e.*, they have each of them the entire possession as well as of every parcel as of the whole; and they must *jointly* sue upon a contract, relating to the estate which is made by, or enures to the benefit of all.*

This unity and entirety of interest which exists between joint tenants has given rise to the principal incident to this estate, which is the right of survivorship.

This right of survivorship is called by our ancient writers, the *jus accrescendi*, because upon the death of one joint tenant, the right to what he had accumulates to the survivor.

As if three joint tenants be in fee-simple, and the one hath issue and dieth, yet they

* Chitty Plead., vol. i., p. 13; 2 Bl. Com., 182; Lit., 288; Co. Lit., 186, a.

which survive shall have the whole tenements, and the issue shall have nothing. And if the second joint tenant hath issue and die, yet the third which surviveth shall have the whole tenements to him and his heirs for ever.*

If an estate be limited to husband and wife and another person, there will not be one third to each of them, but that other person shall take a moiety in joint tenancy with the husband and wife, and the husband and wife shall have the other moiety by entireties, as they are but one person in law.†

But as the right of survivorship is often attended with hardship and injustice, the Courts of Equity have taken a latitude in construing against joint tenancies, on the ground of intent. Thus, in the case of Lake *v.* Craddock,‡ where five persons purchased West Thorock Level from the Commissioners of Sewers, and the purchase was to them as

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* Lit. Ten., s. 280; Co. Lit., 181, a.

† Watkins' Prin., b. iii., c. ii.

‡ 3 P. Wms., 158.

joint tenants in fee, but they contributed rateably to the purchase, which was with an intent to drain the level, after which several of them died; they were held to be tenants in common in equity; and though one of these five contributors deserted the partnership for thirty years, yet he was let in afterwards on terms.

The possession of one joint tenant was formerly considered in law the possession of all of them.

But now, by 3 & 4 Wm. IV., c. 27, s. 12, it is enacted, that the possession of one coparcener joint tenant, or tenant in common, shall not be deemed the possession of the others.

Coparcenary.

An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons, and may be either by common law or by particular custom.*

Parceners after the course of the common law, are where a man or woman, seised of

* Lit., ss. 241, 242, and 265.

certain lands or tenements in fee-simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the daughters, and the daughters enter into the lands or tenement so descended to them, then they are called parceners, and be but *one heir*, to their ancestor.*

So also where lands descend to several aunts or sisters, they will take as parceners.†

Coparceners always take by descent, and as they compose but one heir, they have to some purpose but one freehold, but as to others, several; hence they might have conveyed to each other by release, feoffment, or fine.

As to strangers, they must convey their respective portions or shares by such a conveyance as will pass the freehold; but they cannot exchange with each other till partition.

If there be two parceners, and they make partition by consent, they may release to each other their respective moieties, and there will be no necessity for a lease for a year (or

* Lit., 241. † Ibid., s. 242.

bargain and sale), as the possession at time of partition would be in each.* By recent statute, the lease is in no case required.

Estates in coparcenary are of two kinds;

1. By Common Law. Of these we have already spoken.

2. By custom.

Coparceners by custom are, where a man is seised in fee-simple, or fee-tail of lands, or tenements, which are of the tenure called gavelkind, within the county of Kent, and hath issue divers sons and daughters, such lands and tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this, as between females.†

And lands in Kent are presumed to be of this tenure, till proof to the contrary, whilst elsewhere the custom must be proved.

The possession of one coparcener was, till 3 & 4 Wm. IV., c. 27, generally counted in law, the entry of both, but now it is enacted

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* Watk. Con., c. x. † Lit., s. 265.

by that statute, s. 12, that the possession of one coparcener, joint tenant, or tenant in common, shall not be deemed the possession of the others.

Tenants in Common.

Tenants in common are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously.*

It may be created by the destruction of an estate in joint tenancy, or coparcenary, or severalty.†

Tenants in common take also by *purchase*, but hold by distinct titles, and have separate freeholds, being not seized *per mie et per tout*, as joint tenants are. The best way to create a tenancy in common, is either to limit one moiety of the premises expressly to one, and the other moiety to the other, or to use the words, "to hold as tenants in common, and not as joint tenants," as the law may otherwise construe it a joint estate.

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* 2 Bl Com., p. 191; Lit., 292; Co. Lit., 188, b.

† Lit., ss. 292, 299.

As the possession of tenant in common is undivided till partition, they cannot exchange with each other, though they may exchange either separately or together with a stranger.

But as the seisin of each is distinct, and their estates several, one may enfeoff the other; or if the other have a greater estate, *surrender* to him.

So, one may devise his part to the other, but one cannot release to his companion as such.

Tenants in common may transfer their respective shares to strangers by the usual modes of conveying freehold property, and they may compel a partition among themselves.*

To this estate there is no right of survivorship, but tenancies in common descend to the heirs of each of the tenants, because they have several freeholds, and not an entirety of interest like joint tenants.†

The possession and seisin of one tenant in common, was formerly held to be the posses-

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* Watk., c. xii.

† 1 Inst., 200, a.

sion and seisin of the other, because such possession was not adverse to the right of his companion, but in support of their common title; and although one tenant took the whole of the profits, yet this did not divest the possession of his companion.*

But now by recent statute,† it is enacted that the possession of one tenant in common shall not be deemed the possession of the other.

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* 1 Inst., 199, b.

† 3 & 4 Wm. IV., c. 27, s. 12.

CHAPTER VIII.

OF THE MODES OF CONVEYING OR CHARGING PROPERTY BY ACT OR DEED OF THE OWNER.

Object of deeds—Their origin—Definition of—Indented—Poll—7 & 8 Vict., c. 76—Eight chief requisites to a deed—The seven usual parts of a deed—1. *Agreement*—2. *Feoffment*—3. *Grant*—4. *Gift*—5. *Lease*—6. *Exchange*—7. *Release*—8. *Confirmation*—9. *Surrender*—10. *Assignment*—11. *Bond*—12. *Defeazance*—13. *Recognizance*—14. *Covenant to stand seised*—15. *Bargain and sale*—16. *Lease and Release*—17. *Fine**—18. *Recovery**—19. *Devise or Will.*

To provide a form for every occasion in which conveyances or assurances may be required, cannot be expected in an elementary work like the present. Still, the forms of some of those deeds, usually of most importance, and to which most others, though not in name, may yet in effect and operation be re-

* These now abolished by 3 & 4 W. IV., c. 74.

duced, will be given* for the information and guidance of the student; and such observations are here offered, as may serve to make the subject more plain and intelligible.

The object of deeds seems to be to reduce matters to a certainty. The vagueness of oral testimony would appear to have led mankind at an early period to avail themselves of written or documentary evidence, to prove contracts, covenants, or agreements entered into by them.

In strict propriety of language, the paper, writing, or deed, signed by parties, is not so much the agreement, as evidence of the agreement.

Thus, for example, when A and B have agreed, the one to sell, and the other to purchase an estate, upon certain terms, there is an agreement, and its being reduced to writing is only to make the matter certain.

Prior to the statute of frauds, agreements need not have been reduced to writing; but because it was found that this license gave room to a great deal of fraud, and that parties

* See post Appendix, Forms.

by combining, might often seek to set up by oral testimony an agreement never entered into; and because also, where agreements had been entered into, the terms were so frequently misunderstood by the contracting parties, it was enacted by that statute,* for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury, that,

All leases, estates, interests of freeholds, &c., made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereto lawfully authorized by writing, shall have the form and effect of leases or estates at will only.

s. 2 excepts leases not exceeding three years; and wherein the rent reserved shall be two-thirds of the full improved value of the thing demised.

s. 4 provides, that with exception of leases to be performed within a year, no action shall be brought upon any agreement,

* 29 Car. II., c. 3.

unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

A deed has been defined to be a writing on paper, or parchment, sealed and delivered, to prove the agreement of the parties whose deed it is to the things contained therein.*

Deeds are either indented, or deeds poll; and though a recent Act † has provided that it shall not in future be necessary in any case to have a deed indented, yet as to deeds made prior to the operation of that Act, the distinction hitherto made *in law* requires to be kept in mind; and inasmuch as regards the future, there is no prohibition contained in the Act, it is probable that the ancient method of framing deeds will for a long while to come, be retained.

An indenture is a writing containing some contract, agreement, or conveyance between

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* Co. Lit., 35, b., and 171, b.

† 7 & 8 Vict., c. 76, s. 11.

two or more persons, being indented in the top answerable to another part which hath the same contents.*

A deed poll is that which is plain without any indenting; so called, because it is cut even, or polled.†

A deed, whether indented or poll, *usually* contains the following parts,—

1. The date or time when it was made.

2. The parties or names of the persons to be bound by it.

3. The recitals or statement of circumstances leading to the object intended to be effected.

4. The *testatum* or *witnessing* part in which the parties bind themselves by words of grant or other expressions to the present or future performance of the thing to be done; and in which is also stated the consideration or motive upon which it proceeds.

5. The PARCELS, or subject-matter of the deed

6. The HABENDUM, which expresses the

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* Co. Lit., 229. † Co. Lit., 229, a.

duration, extent, or quantity of interest intended to be affected by the deed.

And 7. The COVENANTS, conditions, or other stipulations, or agreements relative to the object of the deed.*

When it became the practice to reduce agreements into writing, the following circumstances were deemed necessary to a deed:—

1. Sufficient parties, and a proper subject-matter.

2. A good and sufficient consideration.

3. Writing on paper or parchment duly stamped.

4. Words sufficient to specify the agreement and bind the parties, legally and orderly set forth.†

5. Reading, if desired.

6. Sealing and signing.

7. Delivery.

8. Attestation by witnesses.‡

1. Agreements in writing are reciprocal

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1 Concise Precedents in Conveyancing, Introd., pp. vi. & vii.

† See 7 & 8 Vict., 76.

‡ 2 Bl. Com., 296—307.

stipulations between two or more parties either to do or to abstain from some particular act.*

No precise form of words is necessary to an agreement. It ought, however, to contain all the terms of the contract set forth distinctly, and be made with the privity and consent of all the contracting parties.†

And it has been held that a letter is a sufficient agreement when signed by the party to be charged thereby. ‡

2. A feoffment is a conveyance which operates by transmutation of possession, and can only be adopted in cases where the seisin may be, and is actually to be conveyed, as in the transfer of estates of freehold in possession,§ and the proper and usual words in a feoffment are "give, grant, and enfeoff," but any other words of equal import will be sufficient.‖

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* Wilde's Supp., vol. i., 3d edit., Introd., p. 1.

† Camel *v.* Buckle; 2 P. Wms., 243.

‡ Seagood *v.* Neale, 1 Stra., 426; Clerk *v.* Wright, 1 Atk., 12.

§ Watkin's Princ., bk. ii., c. 1; Co. Lit.

‖ Cruise Di., tit. xxxvi., c. 6, s. 5.

3. A GRANT is a conveyance so far similar to a feoffment, that the operative words are, *dedi et concessi*, given and granted; and a feoffment was the regular mode of conveying corporeal hereditaments, and a *grant* was the proper mode for transferring those of an incorporeal nature. Hence the expression, that advowsons, commons, rents, &c., lie in *grant.**

A grant, then, signifies in the common law a conveyance in writing of incorporeal things not lying in livery, and which cannot pass by word only. It has also been taken generally for every gift in grant.

4. A gift is a conveyance which passeth either lands or goods, and it is of a larger extent than a grant, being applied to all things moveable and immoveable. The term gift is properly applied to the creation of an estate tail, as a feoffment is to that of a fee-simple.†

5. A LEASE is a contract for the possession and profit of lands and tenements on the one side, and a recompense of rent or other

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* 1 Inst., 9, a; 1 Inst., 172, a.

† 2 Bl. Com., 316.

income on the other, and must always be for a less term than the lessor has in the premises.*

The words, "demise, lease, and to farm let," are the proper words to constitute a lease.†

But any other words that show the intention of the parties that one shall divest himself of the temporary possession, and the other shall come into it for a certain time, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease as effectually as if the most proper words had been used for that purpose.

Also, a lease must have at its creation a precise period fixed beyond which it is not to continue, yet it may be made to determine prior to that period by a proviso or condition.‡ Tenants for life cannot make leases to continue longer than their own lives, so

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* Cruise, xxxii., c. v.

† 1 Inst., 45, b; and Watk. Princ., bk. ii., c. 4.

‡ Co. Lit., 36, a.

that where a tenant by the curtesy or in dower makes a lease for years and dies, the lease is absolutely determined.

As lessees for years may assign or grant over their whole interest (unless specially restrained), so may they lease it for any fewer number of years than those for which they hold, and such derivative lessee is compellable to pay rent, and perform covenants according to the terms contained in such derivative lease.*

6. An exchange is a mutual grant of equal interests, the one in consideration of the other.†

Formerly an exchange was held to create a mutual warranty between the parties to the exchange, but it is now enacted that the use of the word "exchange" in any deed shall not, after the present year, 1844, have the effect of creating any covenant by implication.‡

The same Act also provides, s. iii., that no

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* Bac. Abr. tit. Lease.

† Watk., bk. ii., c. v.; Co. Lit., 50, b.

‡ 7 & 8 Vict., c. 76, s. 6.

partition, or exchange, or assignment of any freehold or leasehold land shall be valid at law unless the same shall be made by deed.

7. A release is the relinquishment of a right or interest in lands or tenements to another, who has some previous estate in possession in the same lands and tenements.*

The words usually made use of in the operative part of the deed, are, "remised, released, and for ever quit claimed," but there may be other words to constitute a release, as if a lessor grants to the lessee for life that he shall be discharged of the rent, this is a good release.†

8. A confirmation has been defined by Lord Coke to be a conveyance of an estate or right in *esse*, whereby a voidable estate is made sure and unavoidable.‡

It is in some respects similar to a release,§ from which, however, it differs very essentially in other points; as a confirmation only validates and establishes that estate or interest

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* Watk. Prin., bk. ii., c. 6.

† Lit., s. 445, and Co. Lit., 264, b.

‡ Co. Lit., 295, b. § 2 Bl. Com., 326.

which the tenant *already has;* whereas a release is the relinquishment or passing over a right or intent, which the tenant did not before possess.*

Deeds of confirmation are of various kinds, and for effecting various purposes: as where the heir-at-law confirms an estate devised by his ancestor to a stranger, for the better securing the devisee in his possession; or where the reversioner, after death of the tenant for life confirms the lease which was voidable by death of the tenant for life; or where an infant on his coming of age confirmed a feoffment,† executed by him during his minority; or where a principal confirms the act of his agent, or when a lease suspected of being defective on some point, is confirmed by an endorsement thereon, &c.

9. A surrender, *sursum redditio,* is defined by Lord Coke to be a yielding up of an

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* Watk., bk. ii., c. vii.

† By s. 7 of 7 & 8 Vict., c. 76, it is enacted that no conveyance shall be voidable only when made by feoffment or other assurance, where the same would be absolutely void if made by release or grant.

estate for life or years, to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.*

Thus a surrender is of a nature directly opposite to a release, for as that operates by the greater estate descending upon the less, this operates by the falling of a less estate into the greater.

Thus, for instance, as where A the tenant for life or years, yields up his estate or interest to B, the immediate reversioner. And the proper words to be used in a surrender by deed are, "surrendered and yielded up."†

10. An assignment is properly the transfer of the entire interest which one has in any estate in lands, but the term is now usually applied to the transfer of chattels either real or personal, or of equitable interests.‡

When a person parts with his whole term to another, reserving rent to himself, this is not an assignment but an underlease.

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* 1 Inst., 337, b. † Watk. Prin., bk. ii., c. 9.
‡ Watk., ii., 9.

11. A bond or obligation, is a deed poll, whereby the obligor binds and obliges himself, his heirs, executors, and administrators, under a penalty, to pay a certain sum of money to the obligee on a particular day or to do or suffer some act or thing.*

To bonds there is usually a defeazance, *i. e.*, some condition annexed, which when performed, defeats or undoes the bond, and this defeazance is contained in the bond itself.

12. A deed of defeazance differed from that of a bond, and was a collateral deed made at the same time with a feoffment or other conveyance containing certain conditions, upon the performance of which the estate then created may be defeated, *or totally undone.*†

But this mode is very seldom resorted to as a separate deed, and is noticed here chiefly because it is to be found in other books, and seemed therefore to demand a place in a work professing to give the student an insight into the nature of conveyances and assurances.

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* Co. Lit., 172, a. † Watk., bk. ii, c. ix.

13. A recognizance is an obligation of record, entered into by a man to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is witnessed by the record of the court, not by the seal of the party, and is binding upon the lands of the cognisor, from the time of its enrolment.

A recognizance differs from a bond chiefly in this, that a bond is the creation of a new debt; whereas a recognizance is an acknowledgment upon record of a former one.*

14. A covenant to stand seised, is a deed whereby one person seised of lands, or tenements, covenants, in consideration of blood, or marriage, that he will stand seised of such lands and tenements to the use of the party or parties therein named.†

Sometimes the legal owner, desirous of settling his estate on marriage or of fixing it in his family, covenanted to hold and dispose of the land to uses in conformity with the intended destination. Equity enforced the

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* 2 Bl. Com., 341. † Watk. Prin., bk. ii., c. xi.

obligation, so far as the uses were sustained by the consideration of relationship and blood, but no further. An engagement of this kind was called *a covenant to stand seised, i. e.,* to uses.*

15. A bargain and sale is a kind of real contract, founded upon pecuniary consideration, for the passing an estate of inheritance by deed, indented and enrolled.

By this the bargainor becomes seised to the use of the bargainee, and the statute† completes the purchase; or, as it has been well expressed,‡ the bargain first vests the use, and then the statute vests the possession. §

16. A lease and release is in fact a bargain and sale for a year, and a common law release operating by way of enlargement of estate. ‖

Though the machinery consisted of two deeds, it was considered as forming but one conveyance.¶ The first instrument was

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* Hayes Introd. Conv., 5th ed., vol. i., p. 37.

† 27 H. VIII. ‡ Cro., J., 696.

§ 2 Bl. Com., 337. ‖ Cruise, tit. xxxii., c. 13, s. 1.

¶ By 4 & 5 Vict., c. 21, the form of having a previous lease is rendered needless.

called a bargain and sale for a year, or a lease for a year; the second a release, and they formed together the conveyance, known since in general use under the name of a lease and release.*

17. We next come to fines and recoveries, modes of conveyance and assurance, now abolished, but which during centuries formed a very prominent feature in the system of conveyancing, and affected more or less, almost every title to real property throughout the kingdom.

Both fines and recoveries were in their origin, *bonâ fide* suits commenced and carried on for the purpose of recovering real property; they afterwards yielded place to a fictitious contrivance, the complicated machinery of which was made subservient to the purposes of those possessing property.

Experience must soon have discovered that no title could be so secure and notorious, as one which had been questioned by an adverse party and confirmed by the determination of

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* Hayes Introd. Conv., 5 ed. vol. 1, p. 77.

a court of justice; and the ingenuity of mankind soon found out a method of deriving the same advantage from a fictitious process.

To effect this purpose the following plan was adopted; a suit was commenced concerning the lands intended to be conveyed, and when the writ was sued out and the parties appeared in court, a composition was entered into with the consent of the judges, whereby the lands in question were declared to be the right of one of the contending parties.*

A fine is so called from the word *finis*, with which it begins, and also from its effect. Thus Glanville, one of the oldest of our law writers, informs us; † *Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab eâ de cætero potuit contendere.* And Bracton, in like manner, says,‡ Finis, est extremitas, unius cujus que rei, et ideo dicitur, "finalis concordia" quia imponit finem litibus.

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* Cruise, tit. 35, c. 1, s. 2. † Lib. 8, c. 3.
‡ 435, b.

A fine may therefore be described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant or tenant, with the consent of the judges, and enrolled amongst the records of the court, where the suit commenced, by which lands and tenements are transferred from one person to another, or any other settlement is made respecting them.*

18. A recovery was a conveyance or assurance by means of an action brought by the intended grantee, either originally against the grantor, or against another person in such manner as to implicate the grantor in the proceeding, and so conducted, that for want of a sufficient defence, judgment was given against the grantor.†

Both fines and recoveries are now however abolished, by Act of 3 & 4 Wm. IV., c. 74, for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.

For this purpose it prescribes for the barring an estate tail, and all estates and in-

* Cruise, tit. xxxv., c. 2, s. 6. † Burton, p. 34, pl. 104.

terests to take effect after the determination, or in defeazance of the estate tail an assurance by deed* to be enrolled† in the Court of Chancery within six calendar months after the execution.‡

As to alienation by married women, the Act substitutes, for passing the estates and extinguishing the rights and powers of married women in, to, or over land and money, to be laid out in land a deed§ to be acknowledged before a Judge or a Master in Chancery, or certain standing Commissioners;‖ or in the case of absence abroad, &c., special Commissioners¶ to be appointed under the Act, by whom the *feme coverte* is to be examined, in order to ascertain that her consent is freely and voluntarily given.**

Devises, or Wills.

This is another subject requiring rather a distinct treatise than a short section to do it justice.

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* S. 40. † S. 41, and see s. 73.
‡ Haye's Introd. Conv., 5th edit., vol. i., p. 154.
§ S. 77. ‖ S.S. 79, 80, 81, 82. ¶ S. 83.
** Hayes' Introd. Conv., 5th edit., vol. i., p. 206.

A few observations will, however, be all that can here be given, with a view of introducing some of the most prominent points to the student's notice, and preparing him for deeper investigation.

DEVISE is properly where a man gives away lands or tenements by will in writing. And he who gives away his lands in this manner, is called the devisor, and he to whom the lands are given, is called the devisee.

A devise in writing is in legal construction *no deed*, but an instrument by *which* lands are conveyed.

And anciently, where lands were deviseable, it was by custom only; for at common law, in favour of heirs, no lands or tenements in fee-simple, were deviseable by will, nor could they be transferred from one to another, but by solemn livery or seisin, matter of record, or sufficient deed or writing.*

The common law calls that a devise or *will*,

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* 1 Inst., 111, a.

where lands or tenements are given; and where it concerns *goods and chattels alone*, it is termed a *testament*.

In a will of goods there must be an executor appointed, but not of lands only without goods, an executor having nothing to do with the freehold.*

If *lands* are given by will, it is called a *devise;* and *goods* and chattels a *legacy*.

And there is this diversity, before noticed, between lands and tenements given by a *will*, that where lands are devised in fee, or for life, the devisee shall enter without the appointment of others, whilst in cases of goods and chattels there must be the assent of the executor.†

A will, then, is the legal declaration of a man's intentions, which he wills to be performed after his death.

With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and in general no will was permitted of lands till

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* 1 Inst., 111. † Swinburn on Wills, p. 33—729.

the reign of Henry VIII., and then only of a certain portion; for it was not till after the Restoration, that the power of devising real property became so universal as at present.

The statutes 32 Hen. VIII., c. 1, and 34 Hen. VIII., c. 5, allowed all persons having an estate in fee-simple, holden by soccage tenure, to dispose thereof by will; and the statute 12 Car. II., c. 24, by converting all military tenures into soccage, enabled all tenants in fee-simple to devise the whole of their landed property, with the exception of their copyhold tenements.

Dispositions of copyhold estates by will were not effectual without a previous surrender of such estates to the uses of the copyholder's will until the statute 55 Geo. III., c. 192, enacted that thenceforth that formality should not be necessary to give validity to testamentary dispositions of such estates.*

Prior to recent enactments, the execution

* 2 Bl. Com., 12, and n. 25.

of devise, in order to pass freehold lands, must have been attested by three or four witnesses, whilst a will bequeathing personal property, though in some instances two witnesses were required, yet in most others, any paper, even unattested by witnesses, might be proved as the will of a deceased party. The law as regarded this very important department had received fewer modifications than almost any other. Latterly, however, while improvements have been made in the system of conveyancing, as regards transactions *inter vivos*, the law of testamentary disposition has not been neglected.

In the present instance, the Legislature has not confined itself to partial alterations and amendments, but so far as the disposing power is concerned, has grasped the whole subject of testamentary dispositions, propounding one law to all testators as to every species of property, and every mode of dominion.*

The recent Act for the amendment of the

* Hayes, Introd. Conv., vol. i., 341.

laws with respect to wills is given in the Appendix, and requires of the student a diligent and attentive perusal.

On comparing the old law with the provisions of this enactment, it will be seen how many evils have been obviated, how many anomalies reconciled, and what comparative uniformity has been produced as to the law which regulates testamentary dispositions.

The chief points to be attended to are the parties who may make a will, and the mode in which it may be made, executed, and attested.

Respecting the first, all persons who are capable of disposing of their estates *inter vivos*, may dispose of them by will. Minors, however, *i.e.*, persons within the age of twenty-one years, cannot now make a will, for it is provided by the statute now under notice,* that no will made by any person under the age of twenty-one shall be valid. Married women may still make wills in all

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* S. 7.

cases where they might have done so prior to this enactment.

The instances in which a power of testamentary disposition could have been, and can still be exercised by a married woman are principally the following, *e.g.*:—

1. Where she has a separate estate; or,

2. Where a power of appointment is given or reserved to her.

As regards the making of a will, no distinct form is given or prescribed by the statute, and any words from which the mind and intentions of the testator as to what he would have done with his property after his decease, can be collected, will be sufficient.

Great, however, as is the latitude thus allowed, and informal as wills may be in all other points, there are two very important requirements which must imperatively be attended to. These relate to the signing, and the attestation of the will. It is provided by section 9, that no will shall be valid unless signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, and such

signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

APPENDIX.

FORMS.

No. I.

AN AGREEMENT TO TAKE A FURNISHED HOUSE, OR FURNISHED APARTMENTS FOR A YEAR.

ARTICLES OF AGREEMENT entered into this day of , in the year of our Lord, . Between (*the landlord*) of , for himself, his heirs, executors, and administrators, of the one part, and (*the tenant*) of , for himself, his heirs, executors, and administrators of the other part, as follow; that is to say, the said (*landlord*) agrees to let, and the said (*tenant*) agrees to take, a certain messuage or dwelling-house, situate at , together with the fixtures, furniture, crockery, utensils, and things particularly mentioned in the schedule thereof, hereunder written, for the term of years, to commence from the day of , now next ensuing, after

Date.

Parties.

Agreement to let.

For term of one year.

the rate of the yearly rent of £ , of lawful British money, by equal quarterly payments, the first payment thereof to be made on the day of , now next ensuing, (or if so agreed upon) the said day of , (*being the time of the commencement of the tenancy*) in advance, and as or for the next succeeding quarter, and so on until the commencement of the last quarter next preceding the expiration of the said term, when such last quarter's rent shall be payable and paid.

Rent to be paid in advance.

Tenancy may be continued from quarter to quarter.

And it is further agreed by and between the said parties hereto, that the said tenant shall and may after the expiration of the said term of one year, hold and enjoy the said house, furniture, and premises, from quarter to quarter, to be reckoned from the day of , at the same rent as aforesaid, until either of the said parties shall give three calendar months' notice to quit under his hand, to the other of them. And that he the said (*landlord*) shall and will during the said term or time, keep the said messuage and premises in good tenantable repair, and replace such of the furniture as shall from time to time be destroyed or be damaged by reasonable use and wear thereof. And it is also hereby agreed that the said (*landlord*) shall have power to distrain for the said rent upon any of the goods or chattels of the said (*tenant*) as often as the same shall be twenty-one days in arrear, and that at the end of the said term of one year, or expiration of any such notice as aforesaid, he the said (*tenant*)

Landlord will keep in repair.

Maydistrain on goods of tenant.

shall and will leave the said fixtures and furniture, articles and things, mentioned in the said schedule in as good state and condition as the same now are, (reasonable wear and tear thereof only excepted,) and also replace and leave all such dishes, plates, china, glass, and utensils, as shall be broken or in any wise damaged, of the same kind, pattern, and value.—In witness, &c.

Tenant will leave fixtures, &c., in good condition.

Schedule or inventory above referred to.

Front Room, Ground-floor.

One telescope mahogany dining table, &c.

No. II.

Assignment of a Bill of Sale of Goods by Indorsement thereon.

To all to whom these presents shall come, I (*assignor*) of &c., send greeting, Whereas, (*original bargainor or vendor*), of , in and by the within written deed or bill of sale, under his hand and seal, bearing date the day of , bargained, sold, and delivered unto me the said (*assignor*), my executors, administrators, and assigns, all and every his goods, wares, and merchandises, being at or in &c., (*give same description as in the bill.*)

Recitals.

Now know ye, that I the said (*assignor*) for and in consideration of the sum of £ of lawful

Consideration.

British money, to me in hand paid, by (*assignee*), of, &c., (the receipt whereof I do hereby acknowledge,) HAVE bargained, sold, assigned, and delivered, and by these presents publicly and in open market, Do bargain, sell, assign, and deliver, unto the said (*assignee*) all and every the goods, wares, and merchandises, in the schedule to this deed or bill of sale annexed or hereunder written, and to me bargained, and sold, or expressed so to be as aforesaid, and all my right, title, benefit, claim, and demand whatsoever therein and thereunto, under or by virtue of the said deed or bill of sale or otherwise howsoever, To HAVE, hold, receive, take, and enjoy all and singular the said goods, wares, and merchandises, and all other the premises hereby assigned or otherwise assured or intended so to be with the appurtenances, unto him the said (*assignee*), his executors, administrators, and assigns, to and for his and their own use and benefit, and as his and their own proper goods and chattels from henceforth for ever free and clear of all former and other rights, titles, charges, liens, and encumbrances, whatsoever. AND I the said (*assignor*) do hereby make, constitute, and appoint him the said (*assignee*) to be my true and lawful attorney to demand, receive, and take all and singular the said goods, wares, merchandise, and premises, by all lawful means and ways whatsoever, and upon the receipt thereof good and effectual acquittances and acknowledgments in my name or otherwise, to sign and give and moreover to act in

Operative words.

Habendum.

Power of attorney.

all things whatsoever, concerning the premises, as I or my executors or administrators might have done if these presents had not been made. IN WITNESS, &c.

No. III.

BOND BY CLERK, AND HIS SURETY TO EMPLOYER.

KNOW ALL MEN BY THESE PRESENTS, that we (*obligors, clerk and surety, or sureties*), of &c., are jointly and severally holden and firmly bound unto (*employer*), of &c., in the penal sum of £ , of lawful British money to be paid to the said (*obligee*), his executors, and administrators, or assigns, or his or their lawful attorney or attorneys, for which payment to be faithfully and truly made, we bind ourselves jointly, and each of us bindeth himself severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our respective seals. Dated this day of , A.D. Parties. Date.

Whereas the above-named (*employer*), hath taken the above-named (*clerk*), of &c., into his service as a clerk, and the above bounden (*surety*), hath agreed to join with the said (*clerk*) in the above written obligation for his fidelity in the said employ. NOW THE CONDITION of the above written obligation is such that Defeazance. The condition of bond.

interest, use, trust, property, possession, possibility, claim, and demand whatsoever, both at law and in equity of him the said (*confirmor*) in, to, out of, upon, or respecting the said hereditaments and premises in any of them,

Habendum. TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereinbefore ratified and confirmed, or otherwise assured, or mentioned, or intended so to be with, all, and every of their appurtenances unto and to and for the use and behoof of the said (*confirmee*) for himself, his heirs, and assigns for ever. And the said

Covenant by confirmor that he hath not encumbered. (*confirmor*) for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said (*confirmee*), his heirs and assigns, in the manner following; that is to say, that he the said (*confirmor*) hath not at any time heretofore made, done, executed, committed, or knowingly omitted or suffered, nor been party or privy to any act, deed, matter, or thing whatsoever, whereby, or by means whereof, the said messuages, lands, tenements, hereditaments, and premises hereby granted and confirmed, or mentioned, or intended so to be, or any part or parts thereof, or any estate, or interest therein, are, is, can, shall, or may be in anywise impeached, charged, encumbered, or otherwise prejudicially affected in estate, title, value, or otherwise howsoever.—IN WITNESS, &c.*

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* As to what deeds of an infant are *void*, and what are only *voidable*, and therefore capable of confirmation, see Zouch *v.* Parsons; 3 Burr., 1794, 1806; and 7 & 8 Vict., c. 76, s. 7; Watk., 7th ed., 405.

No. V.

Covenant to stand seised to uses in favour of the Covenantor, his Wife, and Children.

This Indenture,* made the day of Date.
, in the year of our Lord ,
between A B (*the covenantor*), of the one part, Parties.
and C D and E F (*covenantee*), of the other
part: witnesseth, that in consideration of the Recitals.

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* The usual form of commencing a deed is here given, because deeds of indenture up to this period have been so commenced, and in all probability will continue so to be commenced, in most instances for some time to come; there is, however, no necessity now for so commencing a deed, nor is there anything prohibiting it. No special form is required or prescribed by the recent Act 7 & 8 Vict., c. 76, which removes by s. 11, the necessity of having a deed *indented* in any case, and provides that any person not being a party to a deed may take an immediate benefit under it, in the same manner as he might under a deed poll.

Mr. Sweet, in his Supplement to the ninth vol. of "Jarman and Bythewood's Conveyancing," p. 22, commences a form for conveyance of freehold in fee, thus:—"A deed made the day of in the year , between ." Observing in note, a, that "Indenting being rendered an immaterial circumstance, the description of deeds as indentures will probably fall into disuse, and advantage may be taken of this change, to correct an obvious impropriety in the present mode of commencing an indenture which contains recitals."

marriage heretofore solemnized between the said A B (*covenantor*), and (G H, *Christian names*), now his wife, and of the natural love and affection which he bears towards her, and towards his children, the said (C D *and* E F, *covenantees*), and in order to make some certain provision for her, and for the children of the said marriage, the said (A B, *covenantor*), for himself and his heirs, hereby covenants with the

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There is certainly an unpleasant interruption and suspension of the meaning, between the naming of the parties, and the witnessing part of the indenture, where recitals intervene. But the commencement with the words "A deed made, &c.," only,—seems on those grounds almost equally to be avoided, and there appears no reason why the two words, "*This is,*" should not be prefixed, as in the old form of the foot chirograph, or indenture of the fine, *Hœc est finalis concordia.* This is the final agreement. And in the same way as wills have commenced, "*This is the last will* and testament of, &c.," so too now we may commence a deed or indenture with these words, "This is a deed, made the day of , in the year , between ; (*naming the parties, and then proceeding with the recitals,*) WHEREAS, &c., and WHEREAS, &c., NOW THIS DEED, or these PRESENTS WITNESS."

It is not intended in this note to compete with the learning and authority of the learned editor of the very valuable work referred to, and the above words are only suggested as an *addition.* If cause can be shown why they should not be used, the arguments adduced will be listened to with the attention they may deserve.

said (C D and E F, *covenantees*), and their heirs, that the said (A B, *covenantor*), and his heirs shall henceforth stand seised of ALL (*parcels*). ALL which said hereditaments and premises the said (A B, *covenantor*), is now seised of for an estate of inheritance in fee-simple in possession, TOGETHER with the rights, members, and appurtenances thereto belonging TO THE USE of the said (A B, *covenantor*), and his assigns, during his natural life, without impeachment of waste; and on the determination of that estate in his lifetime, TO THE USE of the said (C D and E F, *covenantees*), their executors and administrators during the life of the said (A B, *covenantor*), upon trust to permit the said (A B, *covenantor*), and his assigns, to receive the rents and profits of the said hereditaments and premises during his life, and immediately after his decease TO THE USE and intent that the said (G H, *Christian name*), the wife of the said (A B, *covenantor*) in case she shall survive him, may receive out of the rents and profits of the said hereditaments and premises a yearly rent charge of £ sterling money, clear of land-tax and all other deductions, by equal quarterly portions on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly portion to be paid on such of the said days as shall happen next after the decease of the said (A B, *covenantor*), and which rent charge shall be accepted by her in bar and in satisfaction of her dower, thirds,

To use of covenantor.

Rentcharge for wife.

Power of distress.

and freebench, AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rentcharge shall be in arrears for twenty-one days after the same shall become due, it shall and may be lawful for the said (G H, *Christian name*) and her assigns to enter upon the said hereditaments and premises, and distrain for the arrears of the said yearly rent-charge, and the distresses then and there found to dispose of according to law, in order that such arrears and all incidental costs and expenses may be satisfied. AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rent-charge shall be in arrear for thirty days after the same shall become due, it shall be lawful for the said (G H, *Christian name of wife*) and her assigns,

Power of entry.

without any formal demand, to enter into the possession of the said hereditaments and premises, or any part thereof, in the name of the whole, and take the rents and profits thereof until such arrears and all incidental costs and expenses, together with so much of the said yearly rent-charge as shall grow due during such possession shall be satisfied, such possession to be without impeachment of waste, And subject to the said yearly rent-charge, and the remedies for enforcing payment thereof, TO THE USE of all the children of the said (A B, *covenantor*) by the said (G H, *Christian name*) his wife, in equal shares as tenants in common, and their respective heirs and assigns. But if any of such children shall die under the age of twenty-one years, without issue living at his or

her death, THEN as to the share or shares of the child, or respective children so dying, as well original as accruing under this limitation, TO THE USE of the other child or children of the said (A B, *covenantor*) and (G H, *Christian name*) his wife, or if more than one, in equal shares as tenants in common, and the heirs and assigns of such other child or respective children. But if no child of the said (A B, *covenantor*) by the said (G H, *Christian name*) his wife shall attain the said age, or dying under that age, shall leave no issue living at his or her death, *then* as to the said hereditaments and premises, TO THE USE of the survivor of them the said (A B, *covenantor*) and (G H, *Christian name*) and the heirs and assigns of such survivor. IN WITNESS, &c.

Children dying under twenty-one.

No. VI.

ANCIENT CHARTER OF FEOFFMENT.

KNOW ALL MEN, PRESENT AND TO COME, That I (*feoffor*) have given and granted, and by this my present charter have confirmed unto (*feoffee*) for a certain sum of money in hand paid by him to me, one acre of my arable land lying in adjoining the land formerly of TO HAVE AND TO HOLD the aforesaid acre of land, with all its appurtenances to the said (*feoffee*), his heirs and assigns, of the chief lords of the fee, rendering and doing yearly to the same chief lords the services therefore due and accustomed.

Operative words.

Parcels.

Habendum & tenendum.

And I the aforesaid (*feoffor*) and my heirs and assigns, all the aforesaid acre of land, with all
Warranty. its appurtenances to the aforesaid (*feoffee*) and his heir and assigns against all men, will warrant
In witness. for ever. IN WITNESS whereof to this present charter, I have put my seal, these being witnesses (*names of witnesses*) and others. Given
Date. at on the day next before the first of in the year of the reign of King

L. S.

Memorandum of Livery indorsed on the above Feoffment.

BE IT REMEMBERED, that on the day and year within-written, full and peaceable seisin of the within-mentioned acre, with the appurtenances, was given and delivered by the within-named (*feoffor*) to the within-named (*feoffee*) in their respective proper persons according to the tenor and effect of the within-written charter in the presence of (*names of witnesses*) and others.

No. VII.

A DEED OF GIFT OF LAND.

KNOW ALL MEN BY THESE PRESENTS, that I (*the donor*), of , for and in considera-

tion of the esteem and regard which I have for (*the donee*), of HAVE given and granted, and by these presents do freely and absolutely give and grant unto the said (*donee*) and his heirs, all, &c., &c., or howsoever otherwise the said messuages, lands, tenements, and hereditaments, or any of them now are, or is, or heretofore were or was situated, tenanted, called, known, described, or distinguished, together with all and all manner of rights, privileges, advantages, appendages, and appurtenances to the same premises, or any of them belonging, or with the same, or any of them, now or heretofore holden, used, occupied, or enjoyed, and all my estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, in or to the same premises, or any of them, or any part thereof. TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular the premises hereinbefore given and granted, or mentioned, or intended so to be, unto him the said (*donee*) his heirs and assigns to and for the only use, behoof, and benefit of him the said (*donee*) his heirs and assigns for ever. IN WITNESS, &c.

Operative words.

Habendum.

No. VIII.

CONVEYANCE OF FREEHOLDS TO A PURCHASER AND HIS TRUSTEES TO USES TO PREVENT DOWER.

THIS INDENTURE made the day of

Parties.

, in the year of our Lord , between (*vendor*) of, &c., of the first part; (*purchaser*) of, &c., of the second part; and (*trustee for purchaser*) of, &c., of the third part. WHEREAS, &c. And WHEREAS the said (*purchaser*) hath contracted with the said (*vendor*) for the absolute purchase in fee-simple of the said hereditaments, for, and at the price or sum of £ . Now, THESE PRESENTS WITNESS, that in pursuance of the said contract, and in consideration of the said sum of £ of lawful British money, paid by the said (*purchaser*) to the said (*vendor*) before the execution hereof, (the receipt whereof the said (*vendor*) doth hereby acknowledge,) and from the same sum, and every part thereof, doth release and for ever discharge the said (*purchaser*), his heirs, appointees, executors, administrators, and assigns. He, the said (*vendor*), doth by these presents grant release, and convey unto the said (*purchaser*) and his heirs, all that, &c., (*parcels*), TOGETHER with all rights, members, and appurtenances to the said hereditaments and premises, or any part or parts thereof, now or heretofore belonging or appertaining. And also all the estate, right, title, interest, claim, and demand, whatsoever at law, and in equity of the said *vendor* into, and upon the said hereditaments and premises. And also all deeds, papers, and writings relating to, or in anywise concerning the title to the said hereditaments and premises, or any part thereof. To HOLD the said hereditaments and premises unto the said (*purchaser*) and his heirs for ever. To SUCH uses

Recital of contract for purchase.

Testatum.

Consideration.

Vendor releases to purchaser.

Parcels.

General words.

All estate.

All deeds.

upon such trusts, and to and for such ends, intents, and purposes as the said (*purchaser*) shall at any time, or from time to time, by any deed or deeds, appoint, and subject thereto TO THE USE of the said (*purchaser*) and his assigns during his life, with remainder. To THE USE of the said (*trustee*) his executors, and administrators, during the life of the said (*purchaser*) *upon trust*, for the said (*purchaser*) and his assigns, with remainder, to the use of the said (*purchaser*), his heirs and assigns for ever. And the said (*vendor*), for himself, his heirs, executors, and administrators, doth hereby covenant with the said (*purchaser*) and his heirs, that he, the said (*vendor*), now hath in himself power by these presents to convey the said hereditaments and premises unto the said (*purchaser*) and his heirs for ever, to the uses aforesaid, according to the true intent and meaning of these presents. And that the said hereditaments and premises shall at all times hereafter remain to the uses aforesaid, and be quietly held and enjoyed accordingly. And that free, clear, and discharged from, or by the said (*vendor*), his heirs, executors, or administrators, and effectually kept indemnified against all former or other estates, rights, titles, charges, and incumbrances, arising from any such act or default as aforesaid. And further, that the said hereditaments and premises, or any part thereof, shall from time to time, and at any time or times hereafter, at the costs of the person or persons requiring the

Uses to prevent dower.

Covenant by vendor, that notwithstanding, &c

Hath power to convey.

Covenant for further assurance.

same, be further and more effectually or satisfactorily assured to the uses and in manner aforesaid, by such acts, deeds, or other assurances, as the said *purchaser*, his appointees, heirs, or assigns, shall reasonably require to be done and executed.—IN WITNESS, &c.

No. IX.

RELEASE BY THE OBLIGEE OF A BOND TO THE OBLIGOR.

Date. THIS INDENTURE made the day of

Parties. A.D. 18 , between (*obligee*) of, &c., of the one part, and (*obligor*) of, &c., of the other

Recitals. part. WHEREAS the said (*obligor*) by his bond or obligation in writing, bearing date the day of , became bounden in the penal sum of £ , for the due payment of the sum of £ , and interest for the same, after the rate of 5*l. per centum per annum*, on the day of (*or whatever the condition was*). AND WHEREAS the said sum of £ , mentioned in the condition of the said recital bond, with all the interest for the same having been fully paid and satisfied, the said (*obligor*) hath requested the said (*obligee*) to deliver up the said bond to be cancelled. AND WHEREAS the said bond or obligation cannot at present be found to be delivered up to

the said (*obligor*). And the said (*obligee*) hath therefore agreed to execute such release thereof as hereinafter is contained. Now, THIS INDENTURE *or* THESE PRESENTS witness, that the said (*obligee*) doth hereby acknowledge to have received of, and from the said (*obligor*), the said sum of £ , mentioned in the condition of the said hereinbefore in part recited bond, together with all interest which hath accrued thereon unto the day of the date of these presents, and of and from the same and every part thereof, doth acquit, release, exonerate, and discharge the said (*obligor*), his heirs, executors, and administrators for ever by these presents. And the said (*obligee*) doth hereby, for himself, his executors, and administrators, release and discharge unto the said (*obligor*), his heirs, executors, administrators, and assigns, the said hereinbefore in part recited bond or obligation, and all and every the sum and sums of money therein mentioned or acknowledged by the said (*obligor*) to be due, and payable to the said (*obligee*), his executors, administrators, and assigns, and thereby recoverable. And also all and every action and actions, cause and causes of action, suits, accounts, reckonings, debts, sum and sums of money, judgments, executions, claims, and demands whatsoever, both at law and in equity, which he, the said (*obligee*), or any person claiming from, under, or in trust for him, now hath, or hereafter can, shall, or may have against him, the said (*obligor*), his heirs, executors, or administrators, for, or by

Agreement to execute release.

reason of, the said hereinbefore in part recited bond or obligation, or any other matter, cause, or thing whatsoever, concerning the same. *Add covenant by obligee to deliver up the bond when found.*—IN WITNESS, &c.

No. X.

SURRENDER OF A LEASE TO THE LESSOR BY INDORSEMENT.

TO ALL TO WHOM THESE PRESENTS shall come, the within-named (*surrenderor*) sendeth greeting. WHEREAS, &c. (*reciting the nature of the lease and the motive for surrendering it.*) Now THESE PRESENTS WITNESS, that in pursuance of the said agreement, and for and in consideration of the sum of £ of lawful money of Great Britain, to the said (*surrenderor*) in hand, well and truly paid by the said (*surrenderee*), at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged. HE, the said (*surrenderor*), HATH bargained, sold, assigned, surrendered, and yielded up, and by these presents DOTH bargain, sell, assign, surrender, and yield up unto the said (*surrenderee*) and his heirs ALL that, &c., and all other the premises in and by the within written Indenture of lease demised to the said (*surrenderor*), with all and every, the rights, easements, and appurtenants to the same belonging. And all the estate, title, interest, term of years yet to come,

unexpired property, claim and demand whatsoever of him, the said (*surrenderor*), in, to, or out of the said premises, and every or any part thereof, together with the within written Indenture of lease and counterparts of lease, by him, the said (*surrenderor*), granted or demised of the said premises, or any part thereof. To HAVE, take, and receive the messuages, and premises, and estate, and interest hereby surrendered, or intended so to be, with their and every of their rights, members, and appurtenances, unto him, the said (*surrenderee*), his heirs, executors, administrators, and assigns, for all the residue or remainder now to come, and unexpired by effluxion of time, of, or in the same messuages, &c., and premises, to, and for the end, intent, and purpose, that all and singular, the same messuages, &c., and premises, and estate, and interest, shall, or may henceforth become, and be merged and extinguished in, or consolidated with, the freehold, reversion, and inheritance thereof. (Add covenant by lessee that he hath not encumbered, &c.)

No. XI.

FORM OF A WILL.

THIS is the last will and testament of me, (*name and residence of testator, &c.*)

WHEREAS, &c. (*any necessary recitals*),

I hereby direct my executors, hereinafter

named, to pay my funeral and testamentary expenses, and all my just and lawful debts owing from me at the time of my decease, and adjust, settle, compound and compromise, and refer to arbitration, all accounts, matters, reckonings, and things, between me and any other person or persons, and give time for the payment of such debts as shall be owing to me, and accept of such security for the same as they shall think proper.

I hereby give and devise all that freehold messuage, hereditaments, and premises, called, &c., and situate and being at, &c., with the appurtenances, unto A B, &c., his heirs and assigns for ever. Also I give and bequeath my freehold house and premises, wherein I now reside, or situate at , in the county of , unto my dear wife, and her assigns, for and during the term of her natural life, and from and after her decease to my eldest son, his heirs and assigns for ever. And I further also give and bequeath unto my said wife, all my household goods, furniture, plate, linen, china, watches, trinkets, wearing apparel, books, wines and other liquors, and utensils, which shall be in or about my house, at the time of my decease, for her own absolute use and benefit. Also, I give, devise, and bequeath, all my leasehold messuages, lands, and tenements, whatsoever and wheresoever, unto my said executors, hereinafter named, their executors, administrators, and assigns, according to the nature and quality thereof respectively,

for the respective terms, estates, or interests, which I shall have therein at the time of my decease, *upon* trust, to receive the rents and profits thereof, and duly to apply the same for, the support, maintenance, and education, of such of my younger children as shall be within age at the time of my decease, until he or they shall respectively attain the age of twenty-one years, and immediately thereupon upon trust to sell and dispose of the same, and duly to apply the proceeds thereof equally between and amongst such of my said children as may then be living. And I do hereby revoke all former wills and codicils made by me, and I appoint A B, of &c., and C D, of &c., executors of this my last will and testament.

In witness whereof I have hereunto set my hand and seal this day of A.D. 18

Name, &c.

Signed, published, and declared by the above named testator as and for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

A B.
C D.

ANNO PRIMO

VICTORIÆ REGINÆ.

CAP. XXVI.

AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS.

[3d *July*, 1837.]

Meaning of certain words in this Act.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word

"Will."

"Will" shall extend to a Testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the

twelfth year of the reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of *Ireland* in the fourteenth and fifteenth years of the reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service*, and to any other testamentary disposition; and the words, "Real Estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "Personal Estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall ex-

12 Car. 2., c. 24.

14 & 15 Car. 2. (I.)

"Real Estate."

"Personal Estate."

Number.

Gender.

tend and be applied to a female as well as a male.

Repeal of the Statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King *Henry* the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his Land;* and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King *Henry* the Eighth, intituled *The Bill concerning the Explanation of Wills;* and also an Act passed in the Parliament of *Ireland*, in the tenth year of the reign of King *Charles* the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;* and also so much of an Act passed in the twenty-ninth year of the reign of King *Charles* the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of *Ireland* in the seventh year of the reign of King *William* the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any other clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise,

10 Car. 1, Sess. 2, c. 2. (I.)

Sec. 5, 6, 12, 19, 20, 21, & 22, of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12. (I.)

or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of *Ireland* in the sixth year of the reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King *George* the Second, intituled, *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the Twenty-ninth Year of the Reign of King* Charles *the Second, intituled* '*An Act for Prevention of Frauds and Perjuries*,' as relates to estates *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King *George* the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of* Great Britain *called* England, *and in his Majesty's Colonies and Plantations in* America, except so far as relates to his Majesty's colonies and plantations in *America;* and also an Act passed in the Parliament of *Ireland* in the same twenty-fifth year of the reign of King *George* the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;* and also an Act passed in the fifty-fifth year of the reign of

Sec. 14, of 4 & 5 Anne, c. 16.

6 Anne, c. 10. (I.)

Sec. 9 of 14 G. 2, c. 20.

25 G. 2, c. 6, (except as to Colonies.)

25 G. 2, c. 11. (I.)

55 G. 3, c. 192.

King *George* the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.

All property may be disposed of by Will,

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in

force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Estates *pur autre vie*;

contingent interests;

Rights of entry; and property acquired after execution of the will.

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to

As to the fees and fines payable by devisees of customary and copyhold estates.

the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due

or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted; That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir in case of descent.

Estates *pur autre vie*.

VI. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same

shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

No will of a person under age valid;

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

nor of a feme covert, except such as might now be made.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such

witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

X. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Soldiers and mariners wills excepted.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Act not to affect certain provisions of 11 G. 4. & 1 W. 4. c. 20. with respect to wills of petty officers and seamen and marines.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of His Majesty King *George* the Fourth, and the first year of the reign of His late Majesty King *William* the Fourth, intituled *An Act to amend and consolidate the laws relating to the Pay of the Royal Navy*, respecting the wills of petty officers and seamen in the Royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in Her Majesty's navy.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner herein-before required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

XIV. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of, or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execu-

tion of such will, such creditor notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

No will to be revoked by presumption.

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his

direction, with the intention of revoking the same.

No alteration in a will shall have any effect unless executed as a will.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite, or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

A devise not to be rendered inope-

XXIII. And be it further enacted, That no conveyance or other act made or done subse-

quently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

rative by any subsequent conveyance or act.

XXIV. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A will shall be construed to speak from the death of the testator.

XXV. And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the life time of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A residuary devise shall include estates comprised in lapsed and void devises.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testa-

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

tor had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A devise without any words of limitation shall be con-

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such

devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. strued to pass the fee.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate, the words, "die without issue," or, "die without leaving issue," or, "have no issue," or any other words which may import either a want or failure of issue of any person in his life time, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the life time or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. The words, "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole No devise to trustees or executors, except for a term or a presentation to a church, shall

pass a chattel interest.

estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates tail shall not lapse.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gift to chil-

XXXIII. And be it further enacted, That

where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Children or other issue who leave issue living at the testator's death shall not lapse.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of *January*, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of *January*, one thousand eight hundred and thirty-eight.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

XXXV. And be it further enacted, That this Act shall not extend to *Scotland*.

Act not to extend to Scotland.

XXXVI. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament.

Act may be altered this Session.

VICT., 7 & 8.

CAP. LXXVI.

AN ACT TO SIMPLIFY THE TRANSFER OF PROPERTY.

[6th *August*, 1844.]

FOR simplifying the assurance of property by deed, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

Meaning of words defined:

I. That the words and expressions herein-after mentioned, which in their ordinary signification have more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, advowsons, messuages, lands, tithes, tenements, and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, *and to money subject to be invested in the purchase of land* or any interest therein; the word "freehold" shall extend to customary freehold, or such customary land as will pass by deed, or deed and surrender, and not by sur-

"Land:"

"Freehold:"

render alone; the word "conveyance" shall extend to a feoffment, grant, release, surrender, or other assurance of freehold land; the word "person" shall extend to a corporation as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as to one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Conveyance:"

"Person:"

Number and gender.

II. That every person may convey by any deed, without livery of seisin, or enrolment, or a prior lease, all such freehold land as he might before the passing of this Act have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release: provided always, that every such deed shall be chargeable with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.

Freehold land may be conveyed by deed, without livery of seisin or prior bargain and sale.

III. That no partition or exchange or assignment of any freehold or leasehold land shall be valid at law unless the same shall be made by deed.

Partitions, exchanges, and assignments to be by deed.

IV. That no lease in writing of any freehold, copyhold, or leasehold land, or surrender in writing of any freehold or leasehold land, shall be valid as a lease or surrender unless the same shall be made by deed; but any agreement in writing to let or to surrender any such land shall be valid and take effect as an agreement to execute a lease or surrender; and the person who shall be in the possession of the land in

Leases and surrenders in writing to be by deed.

pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year.

Contingent interests may be conveyed by deed.

V. That any person may convey, assign, or charge by any deed any such contingent or executory interest, right of entry for condition broken, or other future estate or interest as he shall be entitled to, or presumptively entitled to, in any freehold, or copyhold, or leasehold land, or personal property, or any part of such interest, right, or estate respectively; and every person to whom any such interest, right, or estate shall be conveyed or assigned, his heirs, executors, administrators, or assigns, according to the nature of the interest, right, or estate, shall be entitled to stand in the place of the person by whom the same shall be conveyed or assigned, his heirs, executors, administrators, or assigns, and to have the same interest, right, or estate, or such part thereof as shall be conveyed or assigned to him, and the same actions, suits, and remedies for the same, as the person originally entitled thereto, his heirs, executors, or administrators, would have been entitled to if no conveyance, assignment, or other disposition thereof had been made; provided that no person shall be empowered by this Act to dispose of any expectancy which he may have as heir, or heir of the body inheritable, or as next of kin, under the statutes for the distribution of the estates of intestates of a living person, nor any estate, right, or interest to which he may become entitled under any deed thereafter to be

executed, or under the will of any living person, and no deed shall by force of this Act bar or enlarge any estate tail: provided also, that no chose in action shall by this Act be made assignable at law.

No implied warranty to be created by "grant" or "exchange."

VI. That neither the word "grant" nor the word "exchange" in any deed shall have the effect of creating any warranty or right of re-entry, nor shall either of such words have the effect of creating any covenant by implication, except in cases where, by any Act of Parliament it is or shall be declared that the word "grant" shall have such effect.

No conveyances to operate by wrong, or have greater effect than a release.

VII. That no conveyance shall be voidable only when made by feoffment or other assurance where the same would be absolutely void if made by release or grant; and that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised (as the case may be).

Contingent remainders abolished.

VIII. That after the time at which this Act shall come into operation no estate in land shall be created by way of contingent remainder; but every estate which before that time would have taken effect as a contingent remainder shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature and having the same properties as an executory devise; and contingent remainders existing under deeds, wills, or instruments executed or made before

Executory devises or estates.

Existing contingent remainders to continue.

the time when this Act shall come into operation shall not fail, or be destroyed, or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine.

Executor or administrator of mortgagee empowered, on discharge of mortgage, to convey the legal estate vested in the heir or devisee.

IX. That when any person entitled to any freehold or copyhold land by way of mortgage has or shall have departed this life, and his executor or administrator is or shall he entitled to the money secured by the mortgage, and the legal estate in such land is or shall be vested in the heir or devisee of such mortgagee, or the heir, devisee, or other assign of such heir or devisee, and possession of the land shall not have been taken by virtue of the mortgage, nor any action or suit be depending, such executor or administrator shall have power, upon payment of the principal money and interest due to him on the said mortgage, to convey by deed or surrender (as the case may require) the legal estate which became vested in such heir or devisee; and such conveyance shall be as effectual as if the same had been made by any such heir or devisee, his heirs or assigns.

Receipts of trustees to be effectual discharges.

X. That the *bonâ fide* payment to, and the receipt of any person to whom any money shall be payable upon any express or implied trust or for any limited purpose, or of the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such sur-

vivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.

Indenting a deed unnecessary.

XI. That it shall not be necessary in any case to have a deed indented; and that any person, not being a party to any deed, may take an immediate benefit under it in the same manner as he might under a deed poll.

The remedies for the rent and covenants in a lease not to be extinguished by the merger of the immediate reversion.

XII. That where the reversion of any land, expectant on a lease, shall be merged in any remainder, or other reversion, or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors, and assigns, shall have and enjoy the like advantage, remedy, and benefit against the lessee, his heirs, successors, executors, administrators, and assigns, for non-payment of the rent, or for doing of waste or other forfeiture, or for not performing conditions, covenants, or agreements contained and expressed in his lease, demise, or grant, against the lessee, farmer, or grantee, his heirs, successors, executors, administrators, and assigns, as the person who would for the time being have been entitled to the mesne reversion which shall have merged would or might have had and enjoyed if such reversion had not been merged.

Act to commence from 31st Dec., 1844.

XIII. That this Act shall commence and take effect from the thirty-first day of *December*, one thousand eight hundred and forty-four, and shall

not extend to any deed, act, or thing executed or done, or (except so far as regards the provisions herein-before contained as to existing contingent remainders) to any estate, right, or interest created, before the first day of *January*, one thousand eight hundred and forty-five.

Act not to extend to Scotland.

XIV. And be it enacted, That this Act shall not extend to *Scotland*.

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